Supreme Court, U.S.
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No. (1)

In the
Supreme Court of the United States

GOODY'S FAMILY CLOTHING, INC., et al.,
Petitioners,

v.

MOUNTAINEER PROPERTY CO. II, LLC, EASTGATE MALL, LLC, and STAFFORD BLUFFTON, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRITT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred by holding that 11 U.S.C. § 365 is not the exclusive statutory basis for the allowance or disallowance of the Respondents' claims for monthly rent that are fully due and payable before the Petitioners filed their bankruptcy cases, and instead holding that the Respondents were entitled to allowed administrative expenses under 11 U.S.C. § 503(b)(1) for that portion of monthly rent representing the daily allocation of monthly rent for the period from and including the day on which the bankruptcy cases were filed through and including the last day of the period for which the pre-filing rent payment would have covered?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), the following list identifies all parties appearing here and before the United States Court of Appeals for the Third Circuit.

The Petitioners here and Appellants below are Goody's Family Clothing, Inc., GFCTN, L.P., and their affiliates GFC Aircraft Leasing, LLC, SYDOOG LLC, Trebor of TN, LLC, GOFAMCLO LLC, Goody's MS, L.P., GFCTX, L.P., Goody's IN, L.P., GFCGA, L.P. Goody's Retail MS, L.P., GFC Aircraft Holdings, Inc., GFC Professional Services, LLC, GFC Aircraft Management, LLC, Goody's Giftco, LLC, Goody's ARDC, L.P., Goody's TNDC, L.P., GFCFS, LLC, Goody's Holding TN, LLC and ISDE, Inc.

The Respondents here and Appellees below are Mountaineer Property Co. II, LLC, Eastgate Mall, LLC, and Stafford Bluffton, LLC.

SUPREME COURT RULE 29.6 STATEMENT

Goody's Family Clothing, Inc., was the ultimate parent of each Petitioner. Pursuant to a confirmed bankruptcy reorganization plan, the Petitioners were succeeded by the following entities: Goody, LLC, New SYDOOG LLC, New Trebor of TN, LLC, New GOFAMCLO, LLC, New Goody's Giftco, LLC, New Goody's MS, L.P., New GFCTX, L.P., New Goody's IN, L.P., New GFCTN, L.P., New GFCGA, L.P., New Goody's ARDC, L.P., New Goody's ARDC, L.P., New Goody's Retail MS, L.P., New Goody's TNDC, L.P., and New Goody's Holding TN, LLC (collectively, the "Successor Entities"). Thereafter, the Successor Entities filed bankruptcy and have since liquidated their assets and confirmed a plan of liquidation. Under the plan of liquidation, upon the occurrence of the effective date, all equity interests in the Successor Entities will be extinguished and all of their assets will be transferred to and administrated by a trust. To the best of Petitioners' knowledge, no public company holds 10% or more of any Successor Entities' equity interests.

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PETITION FOR A WRIT OF CERTIORARI

Goody's Family Clothing, Inc. ("GFC"), GFCTN, L.P. ("GFCTN" and together with GFC, "Goody's") and their affiliates (collectively with Goody's, the "Petitioners") respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit in In re Goody's Family Clothing, Inc.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (Pet. App. A 1a-17a) is reported at In re Goody's Family Clothing, Inc., 268 F.3d 205 (3rd Cir. 2010). The opinion of the United States District Court for the District of Delaware (Pet. App. B 18a-52a) is reported at In re Goody's Family Clothing, Inc., 401 B.R. 656 (D. Del. 2009). The opinion of the United States Bankruptcy Court for the District of Delaware (Pet. App. C 53a-82a, D 83a-84a, & E 85a-86a) is reported at In re Goody's Family Clothing, Inc., 392 B.R. 604 (Bankr. D. Del. 2008).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on June 29, 2010. This petition for a writ of certiorari is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days of the entry of the judgment. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of title 11 of the United States Code, 11 U.S.C. § 101 et seq (the "Bankruptcy Code"). The pertinent provisions, 11 U.S.C. § 365 and 11 U.S.C. § 503, are reproduced in full in the Appendix (Pet. App. F 87a-107a).

STATEMENT OF THE CASE

A. Factual Background.

The facts in this case are straightforward and not in dispute.

On June 9, 2008 (the "Petition Date"), the Petitioners filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

Prior to the Petition Date, GFC entered into non-residential real property leases with Mountaineer Property Co. ("Mountaineer", and such lease, the "Mountaineer Lease") and Stafford Bluffton, LLC ("Stafford", and such lease, the "Stafford Lease"), and GFCTN entered into a non-residential real property lease with Eastgate Mall, LLC ("Eastgate", and collectively with Mountaineer and Stafford, the "Respondents", and such lease, the "Eastgate Lease", and collectively with the Mountaineer Lease and the Stafford Lease, the "Leases"). Pursuant to the Leases, Goody's leased certain premises (the "Leased Premises") at which the Petitioners operated family clothing retail stores.

Each Lease required Goody's to pay each Respondent the full amount of monthly rent, in

advance, on the first day of each month of occupancy. In breach of that obligation, Goody's did not pay the Respondents the monthly rent for the month of June 2008 (the "June Rent").

Following the Petition Date, each Respondent filed a motion pursuant to Bankruptcy Code section 503(b)(1) (collectively, the "Stub Rent Motions") seeking allowance and immediate payment of a post-filing administrative expense for part of the June Rent due and payable on June 1, 2008, which administrative expense was the prorated portion of the June Rent corresponding to each day during the post-filing period in the month of June (i.e., June 9, 2008 through and including June 30, 2008) (the "Stub Rent Period").

The Petitioners and Mountaineer stipulated that the prorated rent for the Stub Rent Period was $18,700 (the "Mountaineer Stub Rent Claim").

The Petitioners and Stafford stipulated that the prorated rent for the Stub Rent Period was $19,855 (the "Stafford Stub Rent Claim").

The Petitioners and Eastgate stipulated that the prorated rent for the Stub Rent Period was $22,305.56 (the "Eastgate Stub Rent Claim", and collectively with the Mountaineer Stub Rent Claim and the Stafford Stub Rent Claim, the "Stub Rent Claims").

The Petitioners, however, objected to the payment of the Stub Rent Claims as administrative expenses under Bankruptcy Code section 503(b)(1), asserting several bases for denying the Stub Rent Motions.

To date, the Respondents have not been paid the Stub Rent Claims.

B. The Bankruptcy Court and District Court Decisions.

Following briefing and a hearing on the Stub Rent Motions, on August 26, 2008, the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") issued its opinion and, thereafter, entered orders[1] overruling the Petitioners' objections to the Stub Rent Motions and granting Stub Rent Motions. By granting the Stub Rent Motions, the Bankruptcy Court allowed the Stub Rent Claims as administrative expenses under Bankruptcy Code section 503(b)(1) as actual and necessary expenses of the post-filing estate. The Bankruptcy Court, however, denied the Respondents' request for immediate payment of the Stub Rent Claims.

The Petitioners timely appealed the Bankruptcy Court's orders to the United States District Court for the District of Delaware (the "District Court"). No cross appeal was filed. Following briefing and oral argument, the District Court issued an opinion and order dated March 31, 2009, affirming the Bankruptcy Court's orders.

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[1] The Mountaineer Stub Rent Claim was addressed by the August 26, 2008 order, while the Eastgate Stub Rent Claim and Stafford Stub Rent Claim were addressed by order dated October 3, 2008.

C. The Third Circuit Court Of Appeals Decision.

The Petitioners timely appealed the District Court's order to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). Following oral argument, the Third Circuit issued an opinion dated June 29, 2010, affirming the District Court's order. On the same day, the Third Circuit entered judgment against the Petitioners.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully submit that there are two reasons why this Court should grant their petition for a writ of certiorari and review the opinion and judgment of the Third Circuit in Goody's. First, by concluding that a landlord may recover "stub rent" under Bankruptcy Code section 503(b)(1), the Third Circuit rejected the Sixth Circuit Court of Appeals' (the "Sixth Circuit") holdings in Koenig Sporting Goods, Inc. v. Morse Road Company (In re Koenig Sporting Goods, Inc)., 203 F.3d 986 (6th Cir. 2000), and BK Novi Project, L.L.C. v. Stevenson (In re Baby N' Kids Bedrooms, Inc.), Case No. 06-15314, 2007 U.S. Dist. LEXIS 29930, 2007 WL 1218768 (E.D. Mich. Apr. 24, 2007), aff'd., Case No. 07-1606, 2008 U.S. App. LEXIS 27720 (6th Cir. Mar. 26, 2008). In rejecting the Sixth Circuit's holdings, the Third Circuit also placed itself in direct conflict with the Eight Circuit Court of Appeals' (the "Eighth Circuit") holding in Burival v. Rochrich (In re Burival), 613 F.3d 810 (8th Cir. 2010), which was decided shortly after Goody's was decided. Second, the Third Circuit created a further division among the Courts of Appeals (the "Circuit Courts") and other courts with respect to the proper interpretation of Bankruptcy Code section 365 and the applicability

of Bankruptcy Code section 503(b) to claims for pre-petition lease rent.

I. THE COURT SHOULD GRANT THE PETITION BECAUSE THERE IS A CONFLICT BETWEEN THE THIRD CIRCUIT AND THE SIXTH AND EIGHTH CIRCUITS.

In 2000, the Sixth Circuit rendered its decision in Koenig. In that decision, the Sixth Circuit considered the meaning of Bankruptcy Code section 365(d)(3) and adopted the "billing date" or "performance date" approach to determining whether claims for lease rent are pre-filing or post-filing claims. Thereafter, in Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), the Third Circuit followed Koenig and adopted the billing date approach. 268 F.3d 205, 211 (3d Cir. 2001).

Since Montgomery Ward was decided, the Sixth Circuit Court of Appeals considered the very same question presented to the Third Circuit in Goody's – whether Bankruptcy Code section 365 is the exclusive statutory basis upon which a landlord may recover rent due and payable prior to the bankruptcy filing, but covering a post-filing period in which a debtor occupies the leased premises as an administrative expense under Bankruptcy Code section 503(b)(1). See Baby N' Kids, Case No. 06-15314, 2007 U.S. Dist. LEXIS 29930 at *10-12, 2007 WL 1218768 at *4 (considering the issue as to whether a landlord may "obtain[] an administrative expense [for 'stub rent'] under [section] 503(b)([1]) [sic] when it could not obtain such an expense under § 365(d)(3)."), aff'd., Case No. 07-1606, 2008 U.S. App. LEXIS 27720 at *7. Relying on the Sixth Circuit's prior decision in Koenig,

the district court concluded that a landlord could not obtain an allowed administrative expense under sections 365(d)(3) and 503(b)(1) for "stub rent" because the obligation to pay that rent arose pre-petition. Baby N' Kids, 2007 U.S. Dist. LEXIS 29930 at *11-12, 2007 WL 1218768 at *4. The Sixth Circuit affirmed. Baby N' Kids, 2008 U.S. App. LEXIS 27720 at *6-7.

In direct conflict with the Sixth Circuit, the Third Circuit held that the Respondents were entitled to allowed administrative expenses for the Stub Rent Claims under section 503(b)(1) notwithstanding the fact that the full amount of the monthly rent was due and payable before the Petition Date. Goody's, Pet. App. A at 12a, 610 F.3d at 818. Critically, in reaching this conclusion, both Circuit Courts purported to apply the test first announced by the United States Court of Appeals for the First Circuit in Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.), 536 F.2d 950 (1st Cir. 1976), to determine whether the landlord could recover under section 503(b)(1). Compare, Goody's, Pet. App. A at 13a-14a, 610 F.3d at 819 (citing and relying on Mammoth Mart and other Courts of Appeals that adopted the Mammoth Mart test), with, Baby N' Kids, 2008 U.S. App. LEXIS 27720 at *6 (same). While the Third Circuit concluded that, under Mammoth Mart, "[t]he [Respondents] are entitled to receive payment under [section] 503(b)(1) for use of their nonresidential real property during the stub period of June 9-June 30, 2008", Goody's, Pet. App. A at 15a, 610 F.3d at 819-20, the Sixth Circuit reached the opposite conclusion, holding that "because the obligation to pay rent for June 2006 arose pre-petition, [the landlord's] claim for rent owing for the entire month of June 2006 is not entitled to priority as an administrative expense under [section] 503(b)(1)."

Baby N' Kids, 2008 U.S. App. LEXIS 27720 at *6-7 (citing Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 818 (6th Cir. 1997) (holding that "the proper standard for determining that claim's administrative priority [under section 503(b)(1)] looks to when the acts giving rise to a liability took place, not when they accrued.")). The Petitioners respectfully submit that the Sixth Circuit's decisions in Koenig and Baby N' Kids are correct and the Third Circuit's decision in Goody's is incorrect.

Moreover, as further discussed below, the Petitioners respectfully submit that the Third Circuit's decision in Goody's is also incorrect because it conflicts with well-established principles of statutory construction, Congressional intent, and the Eight Circuit.

Section 365 in general, and subsections 365(a), (b), (d)(3) and (g) in particular, expressly and specifically address a debtor's obligation to pay lease rent, regardless of whether such rent obligation is in default or not. In that regard, the starting point for the analysis is section 365(a), which provides that "the trustee [or debtor in possession], subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Thus, under section 365(a), a debtor is given two choices, either assume or reject an unexpired lease.

During the post-petition period and while a debtor is considering whether to assume or reject a lease, section 365(d)(3) requires that the debtor "timely perform all the obligations of the debtor . . . arising from and after the [the petition date] under any

unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of [the Bankruptcy Code]." 11 U.S.C. § 365(d)(3).

In the event that a debtor determines to assume an unexpired lease, section 365(b) governs. That subsection provides that upon assumption of an unexpired lease, the debtor must "cure, or provide[] adequate assurance that . . . [it] will promptly cure" any monetary default. 11 U.S.C. § 365(b)(1)(A).

In contrast, upon rejection of an unexpired lease, the debtor is deemed to have breached the lease immediately before the bankruptcy filing. 11 U.S.C. § 365(g)(1) ("[T]he rejection of an . . . unexpired lease of the debtor constitutes a breach of such . . . lease . . . immediately before the date of the filing of the petition."). Consequently, any claim arising under an unassumed lease arising before the commencement of a debtor's bankruptcy case or as a result of the rejection of the lease is a pre-petition general unsecured non-priority claim. See Nat'l Labor Relations Bd. v. Bildisco and Bildisco, 465 U.S. 513, 530 (1984); see also 11 U.S.C. § 502(b)(6).

Therefore, taken together, sections 365(a), (b), (d)(3) and (g) fully address a debtor-tenant's rent payment obligations to a third-party landlord upon assumption or rejection of an unexpired lease of nonresidential property and during the post-petition period while the debtor is considering whether to assume or reject. Despite the comprehensive statutory scheme established by Bankruptcy Code section 365 and intended by Congress, see, In re Handy-Andy Home Improvement Centers, Inc., 144 F.3d 1125, 1127

(7th Cir. 1998) ("Congress passed section 365(d)(3), which takes [landlords] out from under the 'actual, necessary' provision of 503(b)(1) . . . . "), the Third Circuit nonetheless concluded that the comprehensive scheme could be supplemented by Bankruptcy Code section 503(b)(1) to authorize the payment of "stub rent" as a post-filing administrative expense. This statutory supplement was, however, rejected by the Sixth Circuit in affirming the district court's decision in Baby N' Kids.

More recently and subsequent to Goody's, the Eight Circuit reached the same conclusion as that reached by the Sixth Circuit. See Burival, 613 F.3d at 812 (citing Koenig). Specifically, the Eighth Circuit held that "[Bankruptcy Code] section 365(d)(3) expressly preempts subsection 503(b)(1) . . . ." Burival, 613 F.3d at 812. In so holding, the Eighth Circuit relied upon this Court's decision in Lamie v. U.S. Trustee and concluded that "[t]he plain language of [section] 365(d)(3) governs an 'unexpired lease of nonresidential real property' and excepts 'section 503(b)(1).'" Burival, 613 F.3d at 812 (citing Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (holding that a statute that is plain must be enforced "according to its terms")).

In Goody's, the Third Circuit, however, reached directly the opposite conclusion. See Goody's, Pet. App. A at 9a, 610 F.3d at 817 ("Put simply, [section] 365(d)(3) does not supplant or preempt [section] 503(b)(1)."). Thus, there is a clear conflict between the Third Circuit and the Sixth and Eighth Circuits.

Based on the conflict between the Third Circuit and the Sixth and Eighth Circuits, the Petitioners

respectfully submit that this Court should grant their petition for a writ of certiorari.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE THIRD CIRCUIT'S DECISION EXPANDS THE CONFLICT AMONG CIRCUIT COURTS CONCERNING THE PROPER TREATMENT OF RENT.

The proper treatment of rent has been the subject of much dispute in the Courts of Appeals (the "Circuit Courts") and other courts. Prior to the Third Circuit's decision in Goody's, there were two distinct splits among Circuit Courts, as well as other appellate and lower courts, concerning a debtor's obligation to pay "stub rent".

Specifically, courts have split with regard to determining when an "obligation", including rent, "arises" under Bankruptcy Code section 365(d)(3). A majority of Circuit Courts have adopted the "billing date" or "performance date" approach. See Montgomery Ward, 268 F.3d at 211; Rose's Stores, Inc. v. Saul Subsidiary I, L.P. (In re Rose's Stores, Inc.), Case No. 97-2654, 155 F.3d 560, 1998 U.S. App. LEXIS 15334, *2, 1998 WL 393894, *1 (4th Cir. July 10, 1998); Koenig, 203 F.3d at 989; Ha-Lo Industries, Inc. v. Centerpoint Properties Trust, 342 F.3d 794, 799 (7th Cir. 2003); Burival, 613 F.3d at 812.[2] Under the billing

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[2] Many lower courts outside of the Third, Fourth, Sixth, Seventh, and Eighth Circuits have also adopted the billing date approach. See, e.g., In re Designer Doors, Inc., 389 B.R. 832, 842 (Bankr. D. Az. 2008); In re FFP Operating Partners, L.P., Case No. 03-90171-BJH-11, 2004 Bankr. LEXIS 884, *9 (Bankr. N.D. Tex. June 16, 2004).

date approach, a debtor is required to remit payment for rent "when the legally enforceable duty to perform arises under [the] lease." Montgomery Ward, 268 F.3d at 211. Thus, when a debtor was required to pay rent prior to the petition date, but failed to do so, a landlord cannot receive payment for the portion of the rent that accrues post-petition pursuant to Bankruptcy Code sections 365(d)(3) or 503(b)(1). See Baby N' Kids, 2007 U.S. Dist. LEXIS 29930 at *10-12, 2007 WL 1218768 at *4, aff'd. 2008 U.S. App. LEXIS 27720 at *7; see also Burival, 613 F.3d at 812 (rejecting the proration approach and holding that "[Bankruptcy Code] section 365(d)(3) expressly preempts subsection 503(b)(1) . . . .").

In contrast, a minority of appellate courts, including one Circuit Court, have adopted the "proration" approach. See Handy-Andy, 144 F.3d at 1127;[3] see also El Paso Properties Corp. v. Gonzalez (In re Furr's Supermarkets, Inc.), 283 B.R. 60, 70 (B.A.P. 10th Cir. 2002).[4] Under the proration

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[3] The Seventh Circuit initially supported the proration approach in Handy-Andy, but later supported the billing date approach in Ha-Lo. The Ha-Lo court attempted to distinguish Handy-Andy on the facts of the case. See Ha-Lo, 342 F.3d at 798-99, but the Respondents submit that the two cases are not distinguishable because they concern the proper interpretation of Bankruptcy Code section 365(d)(3).

[4] Many lower courts outside of the Seventh and Tenth Circuits have also adopted the proration approach. See, e.g.,; In re Circuit City Stores, Inc., Case No. 08-35653, 2009 Bankr. LEXIS 672, *11-12 (Bankr. E.D. Va. Feb. 12, 2009); In re Stone Barn Manhattan LLC, 398 B.R. 359, 367-68 (Bankr. S.D.N.Y. 2008); In re Winn-Dixie Stores, Inc., 333 B.R. 870, 873-74 (Bankr. M.D. Fla. 2005); In re Nat'l Refractories & Minerals Corp., 297 B.R. 614, 619-20

approach, a debtor must "[p]ay the full rent under the lease for every day that it continue[s] to occupy the property [post-petition under section 365(d)(3).]" Handy-Andy, 144 F.3d at 1127; Furr's, 283 B.R. at 70 (holding that a debtor is required to remit payment for rent "as the obligations accrue, not simply when they are billed."). Thus, when a debtor was required to pay rent prior to the petition date, but failed to do so, a landlord may receive payment for the portion of the rent that accrued post-petition under Bankruptcy Code section 365, not Bankruptcy Code section 503(b). Handy-Andy, 144 F.3d at 1127 ("To give relief to landlords, Congress passed section 365(d)(3), which takes them out from under the 'actual, necessary' provision of 503(b)(1) . . . . There is no indication that Congress meant to go any further than to provide a landlord exception to 503(b)(1)[.]"); In re Stone Barn Manhattan LLC, 398 B.R. 359, 366-67 (Bankr. S.D.N.Y. 2008) (applying the proration approach under Bankruptcy Code section 365(d)(3) to "stub rent" and criticizing the District Court in Goody's reliance on section 503(b) because "Congress intended [section] 365(d)(3) to nullify the requirement of [section] 503(b) . . .").

By its holding in Goody's, the Third Circuit has adopted yet a third approach thereby further dividing the Circuit Courts' approaches to lease rent obligations. Specifically, under the holding in Goody's, lease rent obligations must be paid under Bankruptcy Code section 365 on the post-petition billing date,

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(Bankr. N.D. Ca. 2003); In re Trak Auto Corp., 277 B.R. 655, 663 (Bankr. E.D. Va. 2002); In re Learningsmith, Inc., 253 B.R. 131, 133 (Bankr. D. Mass. 2000).

regardless of whether the underlying amounts accrued before the bankruptcy filing. In addition, a debtor is also obligated to pay lease rent obligations under Bankruptcy Code section 503(b) that accrue after the bankruptcy filing even though those lease rent obligations were due and payable before the filing occurred. Consequently, the Third Circuit's decision in Goody's represents a third Circuit Court approach to lease obligations, standing at odds with the billing date and proration approaches adopted by certain Circuit Courts and numerous lower courts.

Based on the additional conflict concerning the billing date and proration approaches created by the Third Circuit, the Petitioners respectfully submit that this Court should grant their petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petitioners submit that this Court should grant their petition for a writ of certiorari.

Respectfully Submitted,

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2168

[Filed June 29, 2010]

In re: GOODY'S FAMILY CLOTHING INC., et al.,	)
Appellants	)

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 1-08-cv-00585/819/820)
District Judge: Honorable Renee M. Bumb

Argued November 17, 2009

Before: AMBRO, ALDISERT, and ROTH, Circuit Judges

(Opinion filed June 29, 2010)

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OPINION OF THE COURT

AMBRO, Circuit Judge

Goody's Family Clothing, Inc. and certain of its direct and indirect subsidiaries (collectively "Goody's" or "Debtors") appeal the judgment of the District Court affirming the Bankruptcy Court's decision to award "stub rent" as an administrative expense under 11 U.S.C. § 503(b) to three of the Debtors' landlords—Mountaineer Property Co. II, LLC, Stafford Bluffon, LLC, and Eastgate Mall, LLC (collectively the "Landlords"). "Stub rent" here is the amount due a landlord for the period of occupancy and use between the petition date and the first post-petition rent payment.[1] In deciding this issue, we construe further

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[1] Though called "rent," it is not necessarily tied to the rent amounts in the underlying lease agreements. Here, the parties have stipulated to the "stub rent" amounts.

the meaning of 11 U.S.C. § 365(d)(3), first addressed in *Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205 (3d Cir. 2001). We hold that § 365(d)(3) does not supplant § 503(b) and the Landlords are entitled to "stub rent" as an administrative expense. We thus affirm the judgment of the District Court, and do so for essentially the reasons given by Judge Bumb in her excellent opinion.

I. Facts and Procedural Background

The relevant facts are undisputed. Goody's and the Landlords entered into leases for nonresidential real property in various shopping venues around the country. Each provided that rent would be paid in advance on the first day of every month during the term of the lease. Goody's was current on its rent obligations until June 1, 2008, when it did not pay rent due under the leases.

On June 9, 2008, the Debtors filed voluntary petitions for bankruptcy relief under the Bankruptcy Code. They simultaneously filed a motion with the Bankruptcy Court asking for permission to engage in various activities related to the closing of certain stores, including those leased from the Landlords, and the liquidation of the products in those stores. The store-closing sales were to be handled by an agent specifically hired to perform that task.

The Bankruptcy Court granted the motion, and a store-closing agent was hired soon thereafter. Goody's continued to occupy the properties owned by the Landlords, and the sales occurred on premises. The agent sold the merchandise in the designated stores,

taking a portion for itself and turning over the balance of the proceeds to the estate. By Goody's own admission, the sale was "pretty successful" and brought in 105.4% of costs. Additionally, Goody's received from the agent an amount equal to *per diem* rent associated with use of the Landlords' property to conduct the closing sales, including the entire "stub rent" period.

Goody's, however, has not paid the Landlords for the post-petition occupancy of the stores from June 9 through June 30, 2008. In line with 11 U.S.C. § 365(d)(3), Goody's did pay, and the Landlords accepted, the rent due for the month of July on July 1, 2008. The "stub rent" for June remains in dispute.

The Landlords filed administrative expense claims under § 503(b)(1) for the "stub rent," characterizing it as unpaid, post-petition rent that was an actual, necessary cost and expense of preserving the estate. Goody's objected, arguing the "stub rent" was due under the Leases prior to the petition date, making it a general, unsecured pre-petition claim entitled to no special priority. Goody's further argued that § 365 was the exclusive source of obligations and remedies under unexpired leases, making any reference to § 503(b)(1) contrary to statutory text and controlling precedent.

The Bankruptcy Court heard argument on the Landlords' motions and granted them all as administrative expenses, but refused to require immediate payment. 392 B.R. 604 (Bankr. D. Del. 2008). An appeal was taken to the District Court,

which affirmed.[2] 401 B.R. 656 (D. Del. 2009). Debtors then appealed to our Court. The District Court had jurisdiction under 28 U.S.C. § 158(a)(1) over the appeal from the Bankruptcy Court, which had jurisdiction under 28 U.S.C. § 157(b). We have jurisdiction under 28 U.S.C. §§ 1291 and 158(d).

We exercise plenary review over the District Court's conclusions of law,including matters of statutory interpretation. *In re Tower Air, Inc.*, 397 F.3d 191, 195 (3d Cir. 2005). Because the District Court sat as an appellate court to review the Bankruptcy Court, we review the Bankruptcy Court's legal determinations *de novo*, its factual findings for clear error, and its exercises of discretion for abuse thereof. *Id.*

II. Analysis

The threshold question is simple: does the existence of § 365(d)(3) preclude the attempted use of § 503(b)(1) for the "stub rent"? If so, the inquiry ends there. If not, we must then determine whether the "stub rent" may be considered an administrative expense under § 503(b)(1). We answer "no" to the first question and "yes" to the second.

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[2] The issue of immediate payment was not appealed and it is not before us.

A. Section 365(d)(3) does not preempt § 503(b)(1)

Section 365(d)(3) of the Bankruptcy Code imposes a special duty with respect to unexpired leases of nonresidential real property:

> The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C. § 365(d)(3). In *Montgomery Ward*, we interpreted what Congress meant when it referred to "obligations of the debtor . . . arising . . . after the order for relief under any unexpired lease of nonresidential real property." 268 F.3d at 208. We determined that the "clear and express intent of § 365(d)(3) is to require the [debtor] to perform the lease in accordance with its terms." *Id.* at 209. We thus held that "an obligation arises under a lease for the purposes of § 365(d)(3)

when the legally enforceable duty to perform arises under that lease." *Id.* at 211.

Goody's argues that this completes the inquiry—the rent was due on June 1, 2008, prior to the petition date, so it did not need to pay for the occupancy from June 9 to June 30 because § 365(d)(3) does not mandate it.[3] However, *Montgomery Ward* considered only the debtor's obligations under § 365(d)(3) and not, as is asserted here, its obligations under § 503(b)(1). Goody's is not required under § 365(d)(3) to make good on the June 1, 2008, pre-petition obligation, but *Montgomery Ward* did not address post-petition obligations under § 503(b)(1) of a debtor arising from actual occupancy independent of the lease. We turn to this question.

Section 503(b)(1) is specifically mentioned in § 365(d)(3). The provision imposes the duties discussed in *Montgomery Ward* "notwithstanding section

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[3] Goody's also argues that § 365 provides the exclusive avenue through which a debtor can be made to pay lease rent. We reject this argument for numerous reasons. First, we are not confronted with lease rent; we are confronted with "stub rent" under § 503(b)(1), which may or may not be tied to the actual lease rate. Second, other provisions in the Code address leases, dispelling any notion that § 365 is exclusive here. *See, e.g.*, 11 U.S.C. § 503(b)(7) (addressing leases that are assumed and then rejected). Third, because § 365(d)(3) does not address residential leases, Goody's interpretation would imply that a debtor could occupy residential real property prior to assumption or rejection, leaving no § 503(b)(1) remedy for a landlord. Finally, Goody's attempt to invoke *expressio unius est exclusio alterius* (to express one thing is to exclude the others) fails to support the exclusivity of § 365(d)(3)—here, Congress expressly preserved other rights under the Code in the text of § 365(d)(3).

503(b)(1) of [the Bankruptcy Code]." 11 U.S.C. § 365(d)(3). The key word here is "notwithstanding." It means "in spite of" or "without prevention or obstruction from or by." *Webster's Third New Int'l Dictionary* 1545 (1971). In this context, § 365(d)(3) is best understood as an exception to the general procedures of § 503(b)(1) that ordinarily apply.

Post-petition obligations are ordinarily given payment priority as administrative expenses, though such claims must still go through standard procedures of notice and a hearing to demonstrate that the costs were actual, necessary expenses of preserving the estate. *See* 11 U.S.C. § 503(b) ("After notice and a hearing, there shall be allowed administrative expenses, . . . including . . . the actual, necessary costs and expenses of preserving the estate."). Section 365(d)(3) operates to dispense with these requirements for post-petition obligations under an unexpired lease of nonresidential real property, meaning it functions "without prevention or obstruction from or by" § 503(b)(1). This is essentially our holding in *Montgomery Ward*.

Relieving a landlord under § 365(d)(3) of burdensome administrative procedures, however, does not foreclose that landlord's ability to use the more burdensome procedures to recover in situations outside the scope of § 365(d)(3). Put simply, § 365(d)(3) does not supplant or preempt § 503(b)(1). The last sentence of § 365(d)(3) makes this plain: "Acceptance of any such performance [under § 365(d)(3)] does not constitute waiver or relinquishment of the lessor's rights under such lease or under [the Bankruptcy Code]." 11 U.S.C. § 365(d)(3). By accepting the July 1, 2008, payment from Goody's, the Landlords did not

give up any other rights under the Bankruptcy Code, including those accorded by§ 503(b)(1). Indeed, it would put lessors in an awkward place if, while debtors were required to pay them on time pursuant to § 365(d)(3), accepting such a payment served also to deprive lessors of the balance of their rights under the Code.

The text of § 365(d)(3) is consistent with the Conference Report explaining the provision, which we referenced in *Montgomery Ward*. *See* 268 F.3d at 210–11. We specifically referred to the statements of Senator Orrin Hatch, a conferee on the originating act:

> This subtitle contains three major substantive provisions which are intended to remedy serious problems caused shopping centers and their solvent tenants by the administration of the bankruptcy code. . . . A second and related problem is that during the time *the debtor has vacated space* but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments due under the lease. . . . In this situation, the landlord is forced to provide current services—the use of its property, utilities, security, and other services—without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor. The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance

> requirement will [e]nsure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

H.R. Conf. Rep. No. 98-882 (1984), 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 576, 598–99 (emphasis added). The statement supports our conclusion that § 365(d)(3) does not cover the situation in our case. Goody's never vacated the space. On the contrary, it continued to occupy the Landlords' properties to conduct store-closing sales. The purpose of § 365(d)(3) is to protect landlords from the burdensome requirements of § 503(b)(1) in securing payment from non-occupying debtors; it would be perverse indeed to conclude that it then precluded the use of § 503(b)(1) to secure "stub rent" from a debtor actually occupying the premises.

When a debtor occupies post-petition non-residential space it leases, that § 365(d)(3) provides when the rent obligation arises does not erase when lessors may make § 503(b)(1) claims for the value conferred post-petition by that occupancy. We thus conclude that the Landlords may assert a § 503(b)(1) claim for "stub rent."

B. Debtors' occupancy of the leased premises was an actual and necessary benefit to the estate

As § 503(b)(1) is available to the lessors here, we turn to whether the "stub rent" is an administrative expense[4] under § 503(b)(1). We believe it is.

For a commercial lessor's claim to get administrative expense treatment under § 503(b)(1), the debtor's occupancy of the leased premises must confer an actual and necessary benefit to the debtor in the operation of its business. *See Calpine Corp. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 532–33 (3d Cir. 1999) (*citing Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976)). Proving this is the lessor's burden. *Id.* at 533. Thus, the Landlords "must . . . carry the heavy burden of demonstrating that the ['stub rent'] for which [they] seek[] payment provided an actual benefit to the estate and that [incurring 'stub rent' was] necessary to preserve the value of the estate assets." *Id.* (citation omitted).

We look to the *Mammoth Mart* test we adopted in *O'Brien*, and note that "[w]hen third parties are induced to supply goods or services to the debtor-in-possession pursuant to a contract that has not been rejected, the purposes of [administrative claims]

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[4] Administrative expenses, including the "actual, necessary costs and expenses of preserving the estate," may be allowed after notice and a hearing. 11 U.S.C. § 503(b)(1). There is no dispute that notice and a hearing occurred here.

plainly require that their claims be afforded priority." *In re Mammoth Mart*, 536 F.2d at 954. In contrast, when the contract has been fully performed prior to the petition date, it is no longer executory and thus not entitled to payment priority as an administrative expense. In our case, Goody's has continued to occupy the premises post-petition, and it is attempting to do so without providing any post-petition consideration to the Landlords who were still providing services for the premises in the time prior to rejection.

This is similar, though not directly analogous, to the situation in *Zagata*, where we held that "[a]t a minimum, [a creditor] is . . . entitled to a reasonable value for the use and occupancy of its land as an administrative cost under section 503 of the Bankruptcy Code." *Zagata Fabricators v. Superior Air Prods.*, 893 F.2d 624, 627–28 (3d Cir. 1990). Although it addressed an expired lease, *Zagata* supports that the Debtors' retaining possession of the premises, thereby inducing post-petition services from the Landlords, is sufficient under the *O'Brien* and *Mammoth Mart* inquiries to be a transaction justifying administrative priority. This accords with the application of *Zagata* in the Bankruptcy Courts of our Circuit. *See In re DVI, Inc.*, 308 B.R. 703, 707–08 (Bankr. D. Del. 2004) ("A landlord is entitled to an administrative claim in the amount of the fair market value of the premises when a debtor *occupies and uses* them post-petition." (emphasis added)); *In re ZB Co.*, 302 B.R. 316, 319 (Bankr. D. Del. 2003) ("It is beyond dispute that all of the Debtors' landlords whose properties are *occupied and used* post-petition have valid administrative claims." (emphasis added)); *In re HQ Global Holdings, Inc.*, 282 B.R. 169, 173 (Bankr. D. Del. 2002) ("A lessor is generally entitled to an

administrative claim under section 503(b) for the fair rental value of the lessor's property *actually used* by the debtor." (emphasis added)); *cf. In re Unidigital, Inc.*, 262 B.R. 283, 288 (Bankr. D. Del. 2001) (unexpired lease of equipment sought to be abandoned with no continuing use thereof denied administrative priority); *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 51–52 (Bankr. D. Del. 2001) (denying administrative priority because indemnification, though under a pre-petition contract, is not an ongoing actual use of services); *In re Mid-Am. Waste Sys., Inc.*, 228 B.R. 816, 821 (Bankr. D. Del. 1999) (same).

Although mere occupancy is not always an actual and necessary expense that benefits an estate, there can be no reasonable dispute that the occupation of the leased premises here conferred a benefit. Goody's obtained a better than 105% recovery from the store-closing sales, and these sales were an integral part of the bankruptcy proceedings. The sales required a physical venue, and remaining in existing premises was just as necessary and beneficial to the estate as leasing new premises specifically for store-closing sales. Indeed, Goody's own conduct indicates that it saw the occupation of the Landlords' premises as a necessary expense when it charged (and collected from) its liquidation agent "actual [o]ccupancy [e]xpenses" equal to *per diem* rent pursuant to the store closing agreement approved by the Bankruptcy Court. *See* App. 937, 977–78. It would be illogical to allow Goody's to collect the equivalent of "stub rent" from its liquidation agent, but not to require payment to the Landlords of "stub rent" as "necessary expenses." Thus, the Landlords are entitled to a reasonable "stub rent" as an actual and necessary expense for the benefit of the estate.

* * * * *

The Landlords are entitled to receive payment under Bankruptcy Code § 503(b)(1) for use of their nonresidential real property during the stub period of June 9–June 30, 2008. Section 365(d) does not preempt § 503 in this regard. The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2168

[Filed June 29, 2010]

In re: GOODY'S FAMILY CLOTHING INC., et al.,	)
	)
Appellants	)

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 1-08-cv-00585/819/820)
District Judge: Honorable Renee M. Bumb

Argued November 17, 2009

Before: AMBRO, ALDISERT, and ROTH,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of Delaware and was argued on November 17, 2009.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 31, 2009, is hereby

AFFIRMED. Costs taxes against Appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/Marcia M. Waldron
Clerk

Dated: June 29, 2010

APPENDIX B

FOR PUBLICATION [Docket No. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 08-0585 (RMB)

On Appeal from Bankruptcy
Case No. 08-11133 (CSS)

[Filed March 31, 2009]

IN RE: GOODY'S FAMILY CLOTHING, INC., et al.	)
GOODY'S FAMILY CLOTHING, INC., et al.,	)
Appellants,	)
v.	)
MOUNTAINEER PROPERTY CO. II, LLC, et al.,	)
Appellees.	)

OPINION

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BUMB, UNITED STATES DISTRICT JUDGE:[1]

The appellants, Goody's Family Clothing, Inc. and certain of its subsidiaries (the "Debtors" or "Debtor-Appellants"), seek reversal of the Bankruptcy Court's decisions granting administrative expense priority for unpaid stub rent to three of their landlords (collectively, the "Landlords" or "Landlord-Appellees") whose leases Debtor-Appellants rejected: Mountaineer Property Co. ("Mountaineer"), Eastgate Mall, LLC ("Eastgate"), and Stafford Bluffton, LLC ("Stafford").

This appeal calls upon the COURT to resolve the interplay of two sections of the Bankruptcy Code (Title 11 of the United States Code). Specifically, the COURT must decide whether "stub rent" -- that is, rent covering a period of a debtor's post-petition tenancy for which payment became due pre-petition – may be entitled to administrative expense priority under 11 U.S.C. § 503(b)(1), as the Bankruptcy Court decided, or whether the statutory scheme set out in 11 U.S.C. § 365 exclusively governs rent payment obligations, thereby precluding § 503(b)(1) priority, as the Debtor argues.

For the reasons set forth below, the COURT holds that Landlord-Appellees are entitled to § 503(b)(1) administrative expense priority for Debtor-Appellants' post-petition occupancy and use of their leased property. The Debtors' genuine occupancy and use of the Landlords' premises, unlike premises vacated by a

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[1] The Honorable Renée Marie Bumb, United States District Judge for the District of New Jersey, sitting in the District of Delaware by designation.

debtor pre-petition, constituted an actual expense necessary to the preservation of the Debtors' estate. The decision of the Bankruptcy Court is therefore affirmed.

I. Statement of Facts

The relevant facts are undisputed. The Debtors, apparel retailers that operated 350 stores[2] nationwide, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on June 9, 2008 (the "Petition Date"). Eight days earlier, on June 1, the Debtors had failed to pay rent for the month of June to the three Landlord-Appellees.[3] (Importantly, it is not disputed that the rent was due on June 1.) Debtor-Appellants resumed rent payments on July 1, 2008, but the June rent remains unpaid. The unpaid stub rent, that is, the rent for the 21-day period from the Petition Date through June 30, is: $22,305.56 for Appellee Eastgate; $19,855 for Appellee Stafford; and $18,700 for Appellee Mountaineer. Debtor-Appellants occupied and continued to conduct retail business in Landlord-Appellees' three properties during the stub rent period. In fact, during the stub rent period, Debtor-Appellants contracted with and collected rent from a liquidator, which conducted store-closing sales at the three properties.

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[2] Debtor-Appellants have closed a number of these stores since the Petition Date.

[3] Debtor-Appellants also failed to pay rent to other landlords who are not parties to this appeal. The Bankruptcy Court has granted administrative expense priority for a number of these other landlords, and Debtor-Appellants' appeals have been stayed pending this decision.

Landlord-Appellees each moved before the Bankruptcy Court[4] for allowance and immediate payment of the June stub rent. On August 28, 2008, the Bankruptcy Court granted the motion of Appellee Mountaineer, holding that although § 365(d)(3) did not compel payment by the Debtor, Mountaineer could nonetheless pursue its stub rent claim as an administrative expense under § 503(b)(1). In re Goody's Family Clothing, Inc., 392 B.R. 604, 618 (Bankr. D. Del. 2008). Subsequently, on October 3, 2008, for the same reasons explained in its August 28 OPINION, the Bankruptcy Court granted the motions of Appellees Eastgate and Stafford.[5]

Debtor-Appellants timely appealed the Bankruptcy Court's August 28 and October 3 ORDERS, and this COURT consolidated the appeals, as they presented the same issues of law. The COURT heard oral argument on this matter on March 19, 2009.

II. Legal Standards

A United States District Court has jurisdiction to hear appeals of orders of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a)(1). This COURT reviews the Bankruptcy Court's "legal determinations de novo, its factual findings for clear error, and its exercise of discretion for abuse thereof." In re American Pad & Paper Co., 478 F.3d 546, 551 (3d Cir.

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[4] The Honorable Christopher S. Sontchi, United States Bankruptcy Judge for the District of Delaware.

[5] The Bankruptcy Court denied requests by all three Landlord-Appellees to compel Debtor-Appellants to pay its stub rent obligation immediately.

2007); see also Fed. Bankr. P. 8013. As this appeal presents only pure questions of law, the COURT will exercise plenary review. In re Montgomery Ward Holding Corp., 268 F.3d 205, 208 (3d Cir. 2001).

III. Discussion

At issue in this case is whether a mechanism exists within the Bankruptcy Code to allow Landlord-Appellees to recover, on a priority basis, 21 days of rent owed by the Debtor-Appellants. Debtor-Appellants argue that the terms and structure of § 365 leave Landlord-Appellees with no recourse other than to wait in line with all other unsecured creditors. Specifically, Debtor-Appellants argue that § 365(d)(3) requires payment only of rent due between the Petition Date and the debtor's assumption or rejection the lease. Section 365(g), they argue, relegates all other unpaid rent owed under a rejected lease to unsecured status. In relevant part, these provisions state:

> The trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3).

> [T]he rejection of an . . . unexpired lease of the debtor constitutes a breach of such contract or lease . . . if such contract or lease has not been assumed under this section or under a plan

> confirmed under chapter 9, 11, 12, or 13 of this title . . . .

11 U.S.C. § 365(g).

Landlord-Appellees counter that the § 503(b)(1) administrative expense procedure provides an alternative mechanism for the priority recovery of stub rent. Importantly, Landlord-Appellees maintain that an administrative expense claim for unpaid rent does not seek enforcement of the lease as a breached contract; rather, such a claim seeks recovery for actual occupancy and use, which, Landlord-Appellees aver, is an actual expense necessary to the preservation of the estate. (Oral Arg. Tr. at 46-48.) Section 503(b)(1) states:

> After notice and a hearing, there shall be allowed administrative expenses, . . . including . . . the actual, necessary costs and expenses of preserving the estate . . . .

11 U.S.C. § 503(b)(1)(A).

The COURT will address, in turn, the two issues involved in this dispute: whether § 365 exclusively sets the parameters for a non-residential landlord's recovery of rent, and, if not, whether the 21 days of rent at issue here is an allowable administrative expense under § 503(b)(1). By way of background, however, the COURT will first explain the statutory scheme that is the subject of this appeal.

A. The Statutory Scheme

1. Sections 365 and 503(b)(1)

It is often said that the Bankruptcy Code has "two overarching purposes, one equitable and the other rehabilitative." Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 250 (3d Cir. 2001). Sections 503(b) and 365 aim to balance those policies.

Section 503(b) preserves the debtor's estate during the pendency of bankruptcy proceedings by establishing a category of "allowed administrative expenses," which includes "the actual, necessary costs and expenses of preserving the estate" while in bankruptcy. 11 U.S.C. § 503(b). These expenses "receive first priority in the distribution of the assets of the debtor's estate." In re Hechinger Inv. Co. of Delaware, 298 F.3d 219, 224 (3d Cir. 2002) (citing 11 U.S.C. § 507(a)(1)).[6] "By placing creditors who are entitled to payment of these administrative expenses first in line, section[] 503 . . . advance[s] the estate's interest in survival above all other financial goals." Zagata Fabricators, Inc. v. Superior Air Products, 893 F.2d 624, 627 (3d Cir. 1990). For a creditor to bring an administrative expense claim under § 503(b)(1), however, it must, through a process of notice and hearing before the Bankruptcy Court, satisfy "the heavy burden of demonstrating that the costs and fees for which it seeks payment provided an actual benefit

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[6] Indeed, in a Chapter 11 case, "a court cannot confirm a distribution plan unless the plan provides full cash payment of all § 503(b) administrative expense claims or the claim holder agrees to different treatment." Id. (citing 11 U.S.C. §§ 943(b)(5), 1129(a)(9)(A)).

to the estate and that such costs and expenses were necessary to preserve the value of the estate assets." In re O'Brien Environmental Energy, Inc., 181 F.3d 527, 533 (3d Cir. 1999) (internal citation omitted).

Prior to the 1984 Amendments to the Bankruptcy Code, a commercial debtor "was not required to pay rent, but the estate was liable for the reasonable value of the use and occupancy of the premises." In re Dieckhaus Stationers of King of Prussia, Inc., 73 B.R. 969, 971 (Bankr. E.D. Pa. 1987) (citing In re Bye-Rite Distributing Inc., 47 B.R. 660, 663-64 (Bankr. D. Utah 1985)). Under this "reasonable value" standard, a landlord could recover some or all of the rent owed for the period prior to assumption or rejection of the lease by bringing an administrative expense claim pursuant to § 503(b)(1)(A). Id.

With the 1984 Amendments, however, Congress altered the procedure by allowing commercial landlords to bypass § 503(b), in what is now codified as § 365(d)(3). "[N]otwithstanding" the administrative expense procedure of § 503(b)(1), § 365(d)(3) states, debtors "shall timely perform all the obligations . . . under any unexpired lease of nonresidential real property" that arise between the petition-date[7] and the time the lease is assumed or rejected. 11 U.S.C. § 365(d)(3). In other words, § 365(d)(3) makes recovery

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[7] Technically, the lease obligations set out in § 365(d)(3) arise "not [on] the date on which the petition is filed but [on] the date on which the order for relief is entered. Often these are the same date, but not always . . . ." In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125, 1126 (7th Cir. 1998). When a petition is filed voluntarily, as it was here, the order for relief is deemed to enter upon commencement of the case. 11 U.S.C. § 301.

of post-petition rent automatic, rather than requiring landlords to bring, and prove, a § 503(b)(1) administrative expense claim. The 1984 Amendments also required the debtor to assume or reject the lease within a fixed period, which has since been extended to 120 days. 11 U.S.C. § 365(d)(4); see also Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (extending the deadline for assumption or rejection from 60 to 120 days). For cause shown, the Bankruptcy Court may extend that limit 90 additional days. 11 U.S.C. § 365(d)(4)(B)(I).

The passage of § 365(d)(3) struck a balance of equities. On the one hand, a commercial landlord may not evict his bankrupt tenant, even if that means a shopping mall must endure the losses flowing from a vacant anchor-tenant (e.g., department store) for as long as seven months. On the other hand, a debtor-tenant must pay rent during this interim period; the landlord need not pursue a burdensome administrative expense claim to recover what he is owed under the lease. Additionally, the landlord's period of uncertainty, even if burdensome, is capped at seven months (unless the landlord consents to a further extension).

2. Applicability of § 365(d)(3) to Stub Rent? The Montgomery Ward Case

Stub rent presents a peculiar dilemma under § 365(d)(3). The statute requires only that the debtor must perform the lease obligations "arising . . . after the order for relief . . . ." 11 U.S.C. § 365(d)(3). Courts have differed on whether an obligation to pay rent "arises" on the day that rent is due (the "billing-date

approach"), or on each day the tenant occupies the leased premises (the "proration approach"). Compare In re Koenig Sporting Goods, Inc., 203 F.3d 986, 989 (6th Cir. 2000), with In re Duckwall-ALCO Stores, Inc., 150 B.R. 965, 973-74 (D. Kan. 1993).

In a factually different context, the Third Circuit adopted the billing-date approach. In re Montgomery Ward Holding Corp., 268 F.3d 205, 209 (3d Cir. 2001). In that case, during the post-petition/pre-rejection window, a landlord billed his debtor-tenant for reimbursement of taxes owed under the lease. Believing it had an obligation under § 365(d)(3) to pay only the portion of the taxes that had accrued post-petition, the debtor-tenant payed a prorated portion of the bill. The Third Circuit rejected this approach, however, holding that the debtor-tenant had to pay the whole tax bill because, under the lease, the bill had become due, and therefore arose, post-petition.

Tracking the logic of Montgomery Ward, the Bankruptcy Court below held that the rent obligation here arose pre-petition, as it was due eight days before the Petition Date. Goody's, 392 B.R. 608-09. Thus, the Bankruptcy Court held that the rent-payment obligation established by § 365(d)(3) does not apply to stub rent. Id. It stated, "Under the plain meaning of section 365(d)(3), the June rent obligations arose pre-petition and are not administrative expenses under section 365(d)(3)." Id. at 609 (citations omitted).

The parties do not dispute the Bankruptcy Court's conclusion. (App't Br. 11; App'e Br. 18.) Although Landlord-Appellees have suggested that this COURT could revisit the issue, Debtor-Appellants disagree. (Oral Arg. Tr. at 72-73, 75.) Because the COURT

affirms on the § 503(b)(1) grounds, it will not disturb the Bankruptcy Court's application of Montgomery Ward to stub rent. The COURT notes, however, that if it had reached this issue, which it need not do, it might have read Montgomery Ward more narrowly than did the Bankruptcy Court.[8]

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[8] The purpose of § 365(d)(3) was to relieve landlords of the burdens imposed by the administrative expense procedure. Montgomery Ward, 268 F.3d at 210-11. "Congress intended that the debtor in possession perform all the obligations at the time required in the lease." Id. at 211 (internal citation omitted). It is therefore a perverse result that debtor-tenants could use § 365(d)(3) offensively to avoid timely rent payments. Indeed, the 1984 Amendments contemplated the applicability of § 365(d)(3) for only 60 days (subject to extension). It is inconceivable that a debtor-tenant could have avoided half of its rent obligation during this 60-day period by strategically filing a bankruptcy petition on the second day of the month and then rejecting the lease 60 days later, on the 31st day of the subsequent month.

The application of Montgomery Ward to monthly rent payments is problematic, not just because the result runs counter to the purpose of § 365(d)(3), but also because it produces confounding consequences. For example, most commercial leases require full payment of the total rent obligation, with amortization in monthly installments. Applying Montgomery Ward to this payment structure, the entire rent obligation "arises" pre-petition, thus depriving § 365(d)(3) of any practical effect. Conversely, if a lease required that rent be due each day (say, allowing monthly payments for convenience), then § 365(d)(3) would presumably require payment for the complete post-petition/pre-rejection period. Indeed, Montgomery Ward appears to have contemplated this sort of consequence. 268 F.3d at 212 ("[S]trategic behavior . . . can be constrained by forethought and careful drafting."). It is nonetheless perplexing that the statute's impact would turn upon such insignificant lease-drafting choices.

The COURT sees three ways of reconciling Montgomery Ward's apparent rejection of the proration approach with the legislative intent, each of which avoids the above-mentioned inconsistencies. First, rent might be viewed generally as a unique

B. Exclusivity of § 365

At the heart of this appeal lies the question of whether § 365 provides the exclusive mechanism for the recovery of rent, as Debtor-Appellants contend. If so, then § 365(g) relegates Landlord-Appellees' claims to unsecured status. If not, may Landlord-Appellees seek recovery of rent by means of § 503(b)(1) administrative expense claims, as Landlord-Appellees contend.

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sort of obligation that "arises" each day of a tenant's occupancy. In other words, if one month's rent is not paid on June 1 (the due date), then that month's rent obligation arises again, in full, on June 2, 3, and every subsequent day of that month. The result would be that a tenant like Debtor-Appellants who files for bankruptcy on June 9, still owes rent for the full month (not a prorated portion) under § 365(d)(3).

Grace periods provide a second option. Many leases purport to require payment of rent on a particular date, but allow a "grace period" for payment before the tenant is in default. It might be said that the rent is actually due on the last day of the grace period (and that the "due date" defined by the lease is merely a mechanism to induce early payment), or, alternatively, that the rent-payment obligation arises every day of the grace period. If the grace period expires post-petition, it might be said that the payment obligation has arisen post-petition under § 365(d)(3).

Default penalties provide yet a third option. Many leases establish a financial penalty for delinquent rent payments. (The Eastgate lease, for example, establishes a three-percent penalty, which may be imposed after the applicable period for curing the default. (Eastgate Lease, 6 (GFC112) [Docket No. 15, App'x Pt. 3].)) If the penalty accrues during the post-petition/pre-rejection period (as it would have for the Eastgate lease), one might interpret the lease as creating a new obligation to which § 365(d)(3) would apply, namely, payment of the complete delinquent rent plus the penalty.

"The starting point in interpreting a statute is its language . . . ." Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." Reves v. Ernst & Young, 507 U.S. 170, 177 (1993). "[T]he plain meaning of statutory language is often illuminated by considering not only the particular statutory language at issue, but also the structure of the section in which the key language is found, the design of the statute as a whole and its object . . . . " Alaka v. Attorney General, 456 F.3d 88, 104 (3d Cir. 2006) (internal citation omitted). If the statute is ambiguous, however, courts must rely upon the legislative intent and supplementary canons of interpretation. United States v. Gilchrist, 215 F.3d 333, 336 (3d Cir. 2000).

1. Statutory Language and Structure

The Court turns first to the language and structure of §§ 365 and 503(b)(1). On their face, nothing within these provisions suggests that only § 365, at the exclusion of § 503(b)(1), applies to rent payment obligations. Debtor-Appellants contend, however, that the preemptive force of § 365 is conveyed by the statute's overall structure. They argue that, taken together, subsections (a), (b), (d), and (g) of § 365 "fully address" a debtor-tenant's rent obligation, and this completeness implies § 365's preclusive effect. (App't Br. 13.)

a. Statutory Structure

As Debtor-Appellants correctly point out, § 365 provides a roadmap to parties and courts as follows:

First, A debtor must assume or reject an unexpired lease. 11 U.S.C. § 365(a).

Second, Lease obligations arising after filing the petition, but before assumption or rejection of the lease, are payable automatically. 11 U.S.C. § 365(d)(3).

Third, Lease obligations arising before filing the petition are payable according to the following terms:

a. If a debtor assumes the lease, unpaid rent is due promptly. 11 U.S.C. § 365(b)(1)(A).

b. If a debtor rejects the lease, the lease is deemed to be breached. 11 U.S.C. § 365(g)(1).

I. The payment obligation for a breached lease under § 365(g) is deemed an unsecured debt. Bildisco, 465 U.S. at 530.

Debtor-Appellants insist that the statutory trail comes to a dead-end here, at § 365(g). Stub rent, they contend, is nothing more than the sort of unsecured debt encompassed by § 365(g).

The Debtors' argument may be more persuasive in cases where the leased premises go unused -- "lights-out leases".[9] But in cases where the premises are used

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[9] As this is not such a case, the COURT need not address the relevance of § 503(b)(1) to leased premises that have been vacated or are unused by the debtor-tenant.

-- "lights-on leases" -- and the debtor's use constitutes an actual expense necessary to the preservation of the estate, then § 503(b)(1) creates a statutory mechanism for recovery of rent. Thus, contrary to Debtor-Appellants' argument, the statutory trail must include an additional turn under the third step, in certain circumstances giving the unsecured claim administrative expense priority:

> **ii. If the leased premises are used post-petition, and the use is necessary to preserve the estate, the landlord may recover rent, on a priority basis, for the reasonable value of the used premises. 11 U.S.C. § 503(b)(1).**

Bildisco, 465 U.S. at 530 ("If the debtor-in-possession elects to continue to receive benefits . . . pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). In other words, recovery of the rent as an administrative expense is not an enforcement of the breached lease; it is an equitable remedy to compensate the landlord for providing a service that was necessary to preserve the estate.[10]

This understanding of the statutory scheme is consistent with the longstanding and widespread application of § 503(b)(1) to payment of rent. Before

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[10] By this, the COURT does not suggest that landlords should recover twice, once for use of the property and once for breach of the lease. If a landlord is ultimately able to recover as an unsecured creditor for breach of the lease, any prior priority recovery for occupancy and use should, of course, be subtracted from the amount owed for the breach.

§ 365(d)(3) was added to the Bankruptcy Code, commercial debtors were "not required to pay rent, but the estate was liable for the reasonable value of the use and occupancy of the premises" as an administrative expense. Dieckhaus Stationers, 73 B.R. at 971 (internal citation omitted). Just because § 365(d)(3) now makes post-petition rent automatically payable, does not mean that, when a debtor-tenant's post-petition occupancy and use of property is outside the ambit of § 365(d)(3), landlords may not recover under the traditional administrative expense procedure. See In re Dant & Russell, Inc., 853 F.2d 700, 707 (9th Cir. 1988) ("Ordinarily, any claim arising during this interim period would be treated as prepetition, however, where the 'trustee actually uses the leased property, the law is clear that the rent incurred is an allowable administrative expense.'" (quoting 2 Collier on Bankruptcy ¶ 365.08 (15th ed. 1986))). Nothing in the language or structure of the statute weighs against this approach.

Furthermore, Debtor-Appellants' underlying premise, that § 365 "fully address[es]" enforcement of lease obligations, is faulty. Despite the 1984 insertion of § 365(d)(3), § 503(b) has not been rendered irrelevant or void as to post-petition rent in general. For example, if a debtor-tenant decides to assume a lease but later reverses that decision (for example, because it cannot profitably operate at that location), the landlord's rent-recovery remedy is the administrative expense procedure, enabling the recovery of up to two years of lost rent. 11 U.S.C. § 503(b)(7). Furthermore, although the Bankruptcy Code is silent on a landlord's remedy if a debtor-tenant fails to pay post-petition rent as required by § 365(d)(3), a majority of courts have held that his

remedy lies with an "automatic" § 503(b) administrative expense claim. Laurence P. King, 3 Collier on Bankruptcy § 365.04[3][g][ii] (5th ed. 2008); see also In re Midway Airlines Corp., 406 F.3d 229, 235-37 (4th Cir. 2005). Courts have also used the § 503(b)(1) administrative expense procedure in other rent-recovery cases, as when a debtor-tenant continues to occupy and use leased property post-petition, even though the lease is expired or was previously rejected. These examples illustrate the complementarity of §§ 365 and 503(b) as mechanisms by which landlords may recover rent.

b. "Notwithstanding"

Debtor-Appellants further press their argument by contending that the preemptive force of § 365 is conveyed, if not by the statutory structure, then by the word "notwithstanding" in subsection (d)(3). The Bankruptcy Court below engaged in a thoughtful discussion of this point, and the COURT adopts that discussion in full. Citing the dictionary definition of "notwithstanding" as "[i]n spite of, without regard to or prevention by," the Bankruptcy Court explained,

> The proviso "notwithstanding section 503(b)(1)" at the end of section 365(d)(3) means that . . . "aside from administrative expenses provided for in § 503(b)(1), § 365(d)(3) creates a new and different obligation--one that does not necessarily rest on the administrative expense concept." In short, section 365(d)(3) does not limit a landlord's remedies for payment of post-petition rent to that section, rather it expands those rights by providing for the timely payment of rent obligations without the need for

> a landlord to file an administrative claim and seek immediate payment.

Goody's, 392 B.R. at 610-11 (emphasis in original) (citing 2 Shorter Oxford English Dictionary 152 (6th ed. 2007); In re Valley Media, Inc., 290 B.R. 73, 77 (Bankr. D. Del. 2003)).

As discussed above, § 503(b) establishes a burdensome procedure for claiming administrative expenses and proving their necessity. The term "notwithstanding" within § 365(d)(3) operates to carve out a subset of administrative expenses -- namely, post-petition rent -- exempting this special class from the usual burdens and procedures. See In re Duckwall-ALCO Stores, Inc., 150 B.R. 965, 971 n.10 (D. Kan. 1993) ("Lease obligations under § 365(d)(3) are not subject to requirements of § 503 for payment of administrative expenses.").[11] It also exempts the amount of rent owed from § 503(b)(1)'s limitation to the fair value of the debtor's use of the property. In re Cukierman, 265 F.3d 846, 850 (9th Cir. 2001). In other words, the term "notwithstanding" operates to convey

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[11] See also In re Paul Harris Stores, Inc., 148 B.R. 307, 312 (S.D. Ind. 1992) (holding that lessor need not show post-petition rent is actual and necessary for preserving estate); In re Telesphere Communications, Inc., 148 B.R. 525, 530, 531 n.4 (Bankr. N.D. Ill. 1992) (holding that § 365(d)(3) requires payment without application and without court review); In re Western Monetary Consultants, 100 B.R. 545, 547 (Bankr. D. Colo. 1989) (holding that rent payments during first 60 days post-petition are allowed at contractual rate, without notice and hearing, and no showing of reasonableness need be made); In re Coastal Dry Dock & Repair Corp., 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986) (holding that § 365(d)(3) obligation is expressly independent of normal standards for administrative expense claims)

"that irrespective of whether the payments required under the lease meet the usual requirements for administrative status, reasonableness and benefit to the estate, they are unconditionally due.'" In re Stone Barn Manhattan LLC, 398 B.R. 359, 367 n.5 (Bankr. S.D.N.Y. (citing In re Wingspread Corp., 116 B.R. 915, 926 (Bankr. S.D.N.Y. 1990)). Given this interpretation, nothing within the statute suggests that rent is only recoverable through the automatic mechanism of § 365(d)(3), or § 365's other subsections.

Indeed, mindful of this interpretation, § 503(b) affirmatively commands that rent must be recoverable under the administrative expense procedure. Section 503(b) provides, "After notice and a hearing, there shall be allowed administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 503(b) (emphasis added). The word "shall" indicates that the command is mandatory. National Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2531-32 (2007). The statute proceeds to list exceptions to this command, e.g., 11 U.S.C. §§ 503(b)(1)(B), (b)(3)(D), (b)(7), (c), and notably absent from these exclusions is rent for post-petition occupancy and use. See discussion of expressio unius doctrine, infra, at 24-25. Thus, all actual administrative expenses necessary to preserving the estate are recoverable under § 503(b) unless otherwise excluded. Post-petition/pre-rejection use and occupancy is not an exclusion.

Finally, the COURT's holding that § 365(d)(3) does not preempt § 503(b) rests comfortably with Montgomery Ward, which considered only the meaning of § 365(d)(3) in isolation. In that case, the Third Circuit rejected the "proration approach" in favor of

the "billing date approach," not as a matter of policy preference, but as an interpretation of the words "obligations . . . arising under" in § 365(d)(3). 268 F.3d at 208-09. As to the questions of whether § 365(d)(3) preempts § 503(b), and whether prorated rent is recoverable under § 503(b), Montgomery Ward is inapposite.

In short, the language and structure of §§ 365 and 503(b)(1) are unambiguous: When a lease is unenforceable under § 365(d)(3), but the premises are used to the preserve the debtor's estate post-petition, § 503(b)(1) creates a mechanism for a landlord's recovery of rent.

2. Legislative History and Supplemental Canons of Statutory Interpretation

The COURT's reading of §§ 365(d)(3) and 503(b) is also consistent with the legislative history and supplemental canons of statutory interpretation. First, the legislative purpose of § 365(d)(3), as "[v]irtually all courts have agreed," was to "alleviate the . . . burdens of landlords by requiring timely compliance with the terms of the lease." Montgomery Ward, 268 F.3d at 210.

> Prior to 1984, landlords who leased premises to a [debtor-in-possession ("DIP")] sought payment of rent and other postpetition charges as administrative expenses. Several factors, however, made collecting postpetition lease obligations under § 503 an unsatisfactory arrangement. First, a landlord had to comply with the formal and time-consuming procedure of an application, notice, and hearing. Second, a

> landlord could, upon proper proof, only recover the reasonable value of the DIP's actual use and occupancy of the premises. . . . Finally, since bankruptcy courts exercise discretion with respect to the timing of the payment of administrative expenses, the court could delay payment of the amount awarded to the landlord until confirmation of a plan. The resulting loss of income imposed a heavy economic burden on landlords who were forced to provide ongoing services and space to the estate without receiving timely payment to satisfy their own cash obligations.

Joshua Fruchter, To Bind or Not to Bind -- Bankruptcy Code § 365(d)(3): Statutory Minefield, 68 Am. Bankr. L.J. 437, 437 (emphasis in original; footnotes omitted) as quoted in Montgomery Ward, 268 F.3d at 210. To put it more succinctly, "Congress intended that the debtor in possession perform all the obligations at the time required in the lease." Montgomery Ward, 268 F.3d at 210.[12] The House Report for the 1984 Amendments explained the effect of § 365(d)(3) this

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[12] See also In re Koenig Sporting Goods, Inc., 203 F.3d 986, 989 (6th Cir. 2000) ("[T]he purpose [of adding § 365(d)(3)] was "to relieve the burden placed on nonresidential real property lessors (or 'landlords') during the period between a tenant's bankruptcy petition and assumption or rejection of a lease." (citing In re Pudgie's Dev. of NY, Inc., 239 B.R. 688, 692 (S.D N.Y. 1999); 130 Cong. Rec. S8894-95 (daily ed. June 29, 1994) (statement of Sen. Hatch))); In re Stone Barn Manhattan LLC, 398 B.R. 359, 367 (Bankr. S.D.N.Y. 2008) ("Congress intended § 365(d)(3) to nullify the requirement of § 503(b) that a creditor prove benefit to the estate before it can obtain administrative expense status for a post-petition rent claim. That is exactly what § 365(d)(3) states; it applies 'notwithstanding section 503(b)(1) of this title.'").

way: "[C]ourts will have to insure [sic] that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain." Cherkis & King, 1 Collier on Real Estate Transactions and the Bankruptcy Code, § 3.01[6] (2008) (emphasis added).

In spite of this clear legislative purpose, Debtor-Appellants ask the COURT to interpret § 365(d)(3) as a debtor-tenant's weapon to fend off landlords seeking rent owed to them under the lease. To mount this untenable argument, Debtor-Appellants rely upon two canons of statutory interpretation.

The first canon -- that "specific statutory provisions prevail over more general provisions," In re Combustion Eng'g, Inc., 391 F.3d 190, 237 n.49 (3d Cir. 2005) -- provides little support for their position. This interpretive canon is most useful when two statutory provisions conflict. People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373, 1377 n.5 (Fla. 1991) ("A specific statute always prevails over a general statute to the extent of any irremediable inconsistency. In effect, the former is construed as an exception to the latter." (emphasis added)). In such cases, courts sensibly apply the more specifically relevant provision to resolve the conflict. Here, however, there is no conflict, so the canon does not apply. Even if there were a conflict, however, this canon does not trump contrary legislative intent. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001); see also Vines v. Georgia, 499 S.E.2d 630, 632 (1998) ("For purposes of statutory interpretation, a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent." (emphasis added)). As previously discussed, the

legislative intent weighs heavily in favor of Landlord-Appellees.

The second canon of statutory interpretation on which Debtor-Appellants rely is the doctrine expressio unius est exclusio alterius, or, the expression of one item excludes another left unmentioned. Because § 365 is the only section of the Bankruptcy Code addressing the rights of the non-debtor parties to recover rent owed under unexpired commercial leases, the argument goes, the statute should be read to exclude a rent-collection remedy within § 503(b)(1). (App't Br. 24.) This argument misapplies the interpretive canon.

First, courts use this canon to imply exclusion only when "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Nothing within the legislative history supports a finding that Congress intended to exclude rent recovery under § 503(b)(1); indeed, the result Debtor-Appellants advocates is antithetical to the legislative intent. See discussion supra. Second, this canon applies only in the presence of the "essential extrastatutory ingredient of an expression-exclusion demonstration," Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002), that is, when "that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference," E. Crawford, Construction of Statutes 337 (1940), as quoted in Chevron, 536 U.S. at 81. No such "expression-exclusion demonstration" appears in § 365, however. The mere fact that § 365 is specific to fulfilment of lease obligations, while § 503(b)(1) is not, is insufficient to trigger this interpretive canon. If anything, the canon cuts in

Landlord-Appellees' favor inasmuch as rent-collection is not listed among (and might thus be construed as being omitted from) the enumerated exclusions to § 503(b). See, e.g., 11 U.S.C. §§ 503(b)(1)(B), (b)(3)(D), (b)(7), (c).

In short, § 365(d)(3) embodies the legislative determination that commercial debtor-tenants should continue to pay rent when they declare bankruptcy -- the principle of current payment for current services. Nothing within the text of § 365, the legislative history, or other canons of interpretation, bars the collection of post-petition rent through the administrative expense procedure of § 503(b)(1).

C. Applicability of § 503(b)(1)

Having found that § 365 does not preempt § 503(b)(1), the COURT now turns to whether Landlord-Appellees have a proper claim for administrative expenses under § 503(b)(1).

1. Post-Petition Transaction

Section 503(b)(1) grants administrative expense priority for "the actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 501(b)(1)(A). Although not founded in the text of § 503(b), courts have generally held that administrative expense claims must "arise from a transaction with the debtor-in-possession . . . ." In re O'Brien Environmental Energy, Inc., 181 F.3d 527, 532-33 (3d Cir. 1999) (citing In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976)). On this basis, Debtor-Appellants contend that for a claimant-creditor to recover an administrative expense, the transaction between the

debtor and the claimant-creditor must have occurred post-petition. Since the "transaction" here -- namely, the payment of rent[13] – was due to occur eight days before the Petition Date, Debtor-Appellants maintain that stub rent is not recoverable as an administrative expense.

Debtor-Appellants construe the transaction requirement too narrowly. To be eligible for administrative expense priority, a post-petition transaction need not involve the exchange of money or formation of a contract. See Black's Law Dictionary 212, 1535 (8th ed. 2004) (defining "transaction" and "business transaction"). Indeed, a claimant's performance of a pre-petition contract, and a debtor's acceptance of that performance, can establish a post-petition transaction. In re White Motor Corp., 831 F.2d 106, 110 (6th Cir. 1987) (including the provision of consideration within the definition of a post-petition transaction). Here, at least two bases support a finding of a post-petition transaction: Debtor-Appellants' post-

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[13] It is unclear why, in Debtor-Appellants' view, the rent due-date should be considered the relevant "transaction." Debtor-Appellants seem to rely upon the confounding assumption that a tenant's performance of the lease (the payment of rent), but not a landlord's performance (the tenant's undisturbed occupancy), is a "transaction" triggering § 503(b)(1). Under the narrow view proposed by Debtor-Appellants, however, mere performance of a contract is not a transaction at all; thus, the only real transaction giving rise to a tenancy would be formation of the lease agreement. However, if formation of the lease is the relevant transaction, then rent would be recoverable under § 503(b)(1) only if the debtor formed a new lease post-petition. For the reasons set forth below, this consequence is inconsistent with the purposes and widespread application of the administrative expense procedure.

petition decision to occupy and use Landlord-Appellees' property, or alternatively, Debtor-Appellants' post-petition acceptance of Landlord-Appellees' performance of the lease agreement. The latter basis views performance of a pre-petition contract to be sufficient to establish a post-petition transaction; the former basis treats a debtor's decision to occupy and use property as an independent post-petition transaction, separate and apart from the lease. Regardless of which basis the COURT uses, the weight of authority clearly supports permitting administrative expense claims for post-petition rent on pre-petition leases. See In re Dant & Russell, Inc., 853 F.2d 700, 707 (9th Cir. 1988) ("Ordinarily, any claim arising during this interim period would be treated as pre-petition, however, where the 'trustee actually uses the leased property, the law is clear that the rent incurred is an allowable administrative expense.'" (quoting 2 Collier on Bankruptcy ¶ 365.08 (15th ed. 1986))).[14]

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[14] Obviously, "[a] claim is not entitled to priority simply because the right to payment arises after the debtor-in-possession is in place." In re Philadelphia Mortgage Trust, 117 B.R. 820, 828 (Bankr. E.D. Pa. 1990) (emphasis added). However, a strict rule that transactions initiated pre-petition can never give rise to administrative expense claims does not serve the purposes of § 503(b)(1). Because administrative expense priority exists to preserve the estate post-petition, Zagata Fabricators, Inc. v. Superior Air Products, 893 F.2d 624, 627 (3d Cir. 1990), the relevant factor is not when the agreement was formed, but when the services necessary to the preservation of the estate were rendered. See In re Indiana Walnut Products, Inc., 136 B.R. 522, 524 (Brankr. N.D. Ind. 1991). In other words, at least insofar as property leases are concerned, it is performance of the contract, not the date the parties contracted, that gives rise to an administrative expense claim.

The alternative approach cannot be reconciled with the

The COURT faithfully applies the longstanding and widespread application of the administrative expense procedure. Although courts, including the Third Circuit in O'Brien, have often quoted the seemingly rigid "transaction" language of the First Circuit case In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976), those courts have not understood the Mammoth Mart rule to be as narrow as Debtor-Appellants suggest. See, e.g., In re Subscription Television of Greater Atlanta, 789 F.2d 1530 (11th Cir. 1986) (allowing administrative expense claims for "that which is actually utilized . . . in the operation of a debtor's business"); In re Braniff Airways, Inc., 783 F.2d 1283 (5th Cir. 1986) (recognizing an administrative expense claim where the trustee rejects a pre-petition lease). Indeed, Mammoth Mart itself held that, "When third parties are induced to supply goods or services to the debtor-in-possession pursuant to a [pre-petition] contract that has not been rejected, the purposes of [§ 503(b)(1)] plainly require that their claims be afforded priority." 536 F.2d at 954.[15] On this

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purpose of § 503(b)(1). According to Debtor-Appellants, a debtor could avoid administrative expense claims by contracting for a variety of services normally considered necessary to the preservation of the estate the day before filing a bankruptcy petition. Under this scenario, the service-providers would either perform services that are necessary to preserve the estate without priority payment, or, knowing that they may never receive payment, would not perform at all.

[15] This approach is consistent with the traditional application of § 503(b)(1), which, before the addition of § 365, granted administrative expense priority, on a prorated basis, for post-petition rent. In re All for A Dollar, Inc., 174 B R. 358, 360 (Bankr. D. Mass. 1994) (citing In re J. Bain, Inc., 554 F.2d 255 (5th Cir. 1977); In re Lackow Brothers, Inc., 18 B.R. 770, 772 (Bankr. S.D.

basis, the COURT holds that, to the extent that a post-petition transaction is an administrative expense claim's predicate condition, Landlord-Appellees can establish one here.

2. Actual and Necessary Expense

Having held that a landlord's claim for stub rent is appropriate under § 503(b)(1) generally, the COURT now addresses whether the Bankruptcy Court below properly granted administrative expense priority in this case. Debtor-Appellants aver that their post-petition use and occupancy of the leased premises did not give rise to an actual expense that was necessary to preserve the estate. The COURT disagrees.

a. Actual Expense

Debtor-Appellants contend that their occupancy of the leased premises was not an "actual" expense, because their only real expense (that is, the rent) arose on the pre-petition due date. In other words, Debtor-Appellants never incurred an actual expense for 21 days of rent, since the lease does not provide for the landlord's entitlement to payment on a prorated basis. The Bankruptcy Court therefore constructed a "legal fiction" of a rent obligation that arises daily, Debtor-Appellants argue, from which the Bankruptcy Court derived the theoretical, not "actual", prorated rent expense at issue here. (App't Br. 34-35.)

Fla. 1982); In re Keyboard Center, Inc., 9 B.R. 475, 475 (Bankr. W.D. La. 1981)).

Contrary to Debtor-Appellants' argument, the lease is not the conclusive arbiter of whether an expense is "actual". Reliance upon the terms of a lease to define a tenant's payment obligations may be warranted in a § 365 analysis, see Montgomery Ward, 268 F.3d at 209 (requiring "perform[ance of] the lease in accordance with its terms"), but not necessarily for a § 503(b)(1) administrative expense claim.[16] Certainly, had Landlord-Appellees invoiced Debtor-Appellants (as any other service-provider would) for the unpaid stub rent, Debtor-Appellants would clearly have incurred an actual post-petition administrative expense. Thus, Debtor-Appellants' argument ultimately hangs upon the unremarkable failure of Landlord-Appellees to send them a bill, post-petition, for the 21 days' use of its premises.

As the Bankruptcy Court did, this COURT, too, construes Landlord-Appellees' administrative expense claim itself as a demand that Debtor-Appellants pay the stub rent. Thus, insofar as Landlord-Appellees demanded payment for 21 days' use of their premises, the expense is "actual."[17]

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[16] This is especially true here, as Landlord-Appellees' claim arises not from the lease, but from Debtor-Appellants' actual occupancy and use of the property. See discussion supra at 6 ("[A]n administrative expense claim for unpaid rent does not seek enforcement of the lease as a breached contract; rather, such a claim seeks recovery for actual occupancy and use . . . .").

[17] Of course, the COURT's finding of a § 503(b)(1) actual expense for stub rent is consistent with the longstanding and widespread practice of awarding rent, on a prorated basis, for post-petition use and occupancy of leased property. In re All for A Dollar, Inc., 174 B.R. 358, 360 (Bankr. D. Mass. 1994). This undoubtedly accounts for Debtor-Appellants' failure, in light of the dozens of

b. Necessary to Preservation of the Estate

Debtor-Appellants next contend that their occupancy of the leased premises was not a "necessary" expense. The COURT rejects this position. When a debtor uses a landlord's premises for its post-petition business, this will ordinarily satisfy the requirement that the use be "necessary." Zagata, 893 F.2d at 627 ("There is no question, of course, that the payment of rent for the use and occupancy of real estate ordinarily counts as an 'actual, necessary' cost to which a landlord, as a creditor, is entitled." (citing Philadelphia Co. v. Dipple, 312 U.S. 168 (1941); In re 48th Street Steakhouse, Inc., 61 B.R. 182 (Bankr. S.D.N.Y. 1986))).[18] During the full stub rent period here, not only did Debtor-Appellants use Landlord-Appellees' premises to conduct normal business; they also rented the premises to a liquidator to conduct profitable store-closing sales. (Oral Arg. Tr. at 87, 89; App'e Br. 41; Sept. 22, 2008 Hearing Tr. at 11, 18 (GFC573, 580) [Docket No. 15, App'x Pt. 12].) This fact is sufficient to

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cases awarding rent as an administrative expense, to cite a single authority adopting their position.

[18] See also In re Garden Ridge Corp., 321 B.R. 669 (Bankr. D. Del. 2005) ("The claimant need not prove that the property was put to its highest and best use; instead, the claimant need only show that the property was actually used by the debtor in the ordinary course of business.").

Debtor-Appellants attempt to distinguish Zagata on its facts. The distinguishing facts, however, are irrelevant to the more general proposition for which the COURT cites Zagata. Furthermore, the fact that Zagata predates Montgomery Ward is inapposite, since Montgomery Ward interpreted § 365(d)(3), not § 503(b)(1).

establish the necessity of Debtor-Appellants' use of the premises.[19] Here, there is no ambiguity as to whether Debtor-Appellants genuinely occupied and used the premises; for the 21 days at issue here, these were clearly "lights-on" leases. Had Debtor-Appellants vacated, or merely left idle, the premises -- a "lights out" lease -- Landlord-Appellees would be faced with a more difficult claim. On this basis, the COURT holds

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[19] Debtor-Appellants urge the COURT to remand because the Bankruptcy Court, they aver, never made a finding of fact as to the necessity of their occupancy and use of Landlord-Appellees' property. The Bankruptcy Court's citation to Zagata, however, was tantamount to a finding that Debtor-Appellants' use of the properties was necessary to preserve the estate. See Goodies, 392 B.R. at 614 ("[T]he mere fact that the Debtors are occupying the Landlords' premises is sufficient, in and of itself, to establish that payment for that use and occupancy is an actual, necessary expense of preserving the Debtors' estates under section 503(b)(1)."). Indeed, transcripts from the proceedings before the Bankruptcy Court reveal that it did consider the matter of necessity, (Sept. 22, 2008 Hearing Tr. at 19-20, 31 (GFC581-82, 593) [Docket No. 15, App'x Pt. 12] ("I think that the debtor's use and occupancy of the premises, and . . . conducting business in the locations at issue during the stub-rent period, in and of itself, provides that it's a[n actual] and necessary expense for the estate . . . ")), and that Debtor-Appellants failed to present evidence before the Bankruptcy Court to rebut the strong presumption that occupancy and use establishes necessity, Zagata, 893 F.2d at 627, as well as the presumption that the rental-rate reflected in the lease represents fair market value. Indeed, Debtor-Appellants have admitted that they used the three properties at issue here throughout the stub rent period, and held profitable store-closing sales during that period. (Oral Arg. Tr. at 24, 31-32; Sept. 22, 2008 Hearing Tr. at 11, 18 (GFC573, 580) [Docket No. 15, App'x Pt. 12].) For this reason, the COURT declines Debtor-Appellants' invitation to remand the case to the Bankruptcy Court for a finding that the expense at issue here was "actual" and "necessary."

that the Bankruptcy Court's § 503(b)(1) administrative expense allowance for stub rent was proper here.

IV. Conclusion

The COURT need not, and indeed does not, rest upon the balance of equities in its resolution of this appeal. The COURT notes, however, that the equities weigh heavily in Landlord-Appellees' favor. Section 503(b)(1) embodies the legislative determination that providers of services necessary to preserve the debtor's estate are entitled to priority compensation to protect both the estate's survival and the financial interests of all creditors. Section 365(d)(3) embodies the legislative determination that landlords should continue collecting rent, even after a debtor-tenant has filed for bankruptcy. The COURT cannot understand how these two statutory provisions, taken together, should shield debtor-tenants from paying rent in the days and weeks immediately following their bankruptcy filing--perhaps the time most critical to preservation of the estate.

For the reasons stated herein, the decision of the Bankruptcy Court below is affirmed. An appropriate ORDER will issue this date.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

Dated: March 31, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 08-0585 (RMB)

On Appeal from Bankruptcy
Case No. 08-11133 (CSS)

[Filed March 31, 2009]

IN RE: GOODY'S FAMILY CLOTHING, INC., et al.	)
GOODY'S FAMILY CLOTHING, INC., et al.,	)
Appellants,	)
v.	)
MOUNTAINEER PROPERTY CO. II, LLC, et al.,	)
Appellees.	)

ORDER

THIS MATTER coming before the COURT upon appeal by Goody's Family Clothing, Inc. and certain of its subsidiaries, and

THE COURT having reviewed the parties' written submissions and having heard oral argument on March 19, 2009; and

For the reasons stated in the OPINION issued herewith; it is on this 31st day of March 2009, hereby

ORDERED that the Bankruptcy Court below is AFFIRMED; and it is further

ORDERED that the CLERK OF THE COURT shall **CLOSE** this file.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11

Case No. 08-11133(CSS)
Jointly Administered

Re Docket Nos. 207, 248 and 262

[Filed August 26, 2008]

In re:	)
	)
GOODY'S FAMILY CLOTHING, INC., et al.,	)
Debtors.	)
	)

OPINION[1]

Gregg M. Galardi (Argued)
Marion M. Quirk
Skadden, Arps, Slate, Meagher & Flom, LLP

[1] This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

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Dated: August 26, 2008

Sontchi, J. /s/ Christopher S. Sontchi

INTRODUCTION

"Notwithstanding" is one of the most frequently used and misunderstood words in the legal vocabulary. Its meaning is at the heart of the dispute before the Court. Specifically, can the Court allow an administrative claim for unpaid post-petition rent on behalf of a commercial landlord under section 503(b)(1) of the Bankruptcy Code as an actual, necessary cost and expense of preserving the estate? Or, rather, is section 365(d)(3), which requires the trustee to "timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, *notwithstanding section 503(b)(1),*" and, in the event of an assumption, section 365(b)(1)(A), the *sole* bases for allowance of an administrative claim for post-petition rent?

The Court finds that because "notwithstanding" means "in spite of," sections 365(d)(3) and 365(b)(1)(A)

provide for the allowance and timely payment of administrative claims for post-petition rent regardless of section 503(b)(1). These sections, however, are not the sole refuge for unpaid landlords. The Court may allow an administrative claim for unpaid post-petition rent on behalf of a landlord, provided that the claim is for an actual, necessary cost and expense of preserving the estate. The amount of the claim is the fair market value of the premises, and that value is presumed to be the rent due under the lease unless evidence is presented to the contrary.

An administrative expense claim under section 503(b)(1) for post-petition rent, however, need not be timely paid under section 365(d)(3). Rather, the timing of the payment is in the Court's discretion.

In this case, the moving landlords have an allowed administrative claim under section 503(b)(1) of the Bankruptcy Code for unpaid post-petition rent in the amount due under the applicable lease. The Court will deny, however, the landlords' request for immediate payment of the allowed administrative claims.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B), (M) and (O).

STATEMENT OF FACTS

On June 9, 2008 (the "Petition Date"), Goody's Family Clothing, Inc. and its affiliates (collectively, the

"Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors are a moderately priced family apparel retailer, which, as of the Petition Date, operated approximately 350 stores in small to midsize markets throughout the United States.[2]

The Debtors have continued to operate their business and occupy certain rental properties as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. Among the rental properties currently occupied by the Debtors are those leased from (I) Libby Westmark Enterprises, LLC and Libby Cross Station Enterprises, LLC (collectively, "Libby"); (ii) Bernard Court, LLC, Cookeville Retail Holdings, LLC, and Owensboro Towne Center, LLC (collectively, "Owensboro"); and (iii) Mountaineer Property Co. ("Mountaineer," collectively with Libby and Owensboro, the "Landlords"). The Debtors have unexpired leases of nonresidential real property (the "Leases") with the Landlords and currently occupy the premises under each of the Leases.

The Debtors did not pay the rent under the Leases due on June 1, 2008.[3] Nor have the Debtors paid rent for the post-petition period from the Petition Date through June 30, 2008. The Landlords and the Debtors have stipulated that the unpaid "stub rent" under each of the Leases for the 21-day post-petition period through June 30, 2008, is:

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[2] Since the Petition Date the Debtors have closed approximately 70 stores with Court approval.

[3] The Debtors timely paid the rent due under the Leases on July 1, 2008.

- Libby - $22,491;
- Owensboro - $49,315; and
- Mountaineer - $18,700.

Each of the Landlords filed a motion for allowance and immediate payment of the applicable stub rent. The Debtors filed objections to each of the motions, arguing that:

a. allowance of an administrative claim for stub rent and timely payment thereof is not available under section 365(d)(3) because the obligation to pay the stub rent did not arise post-petition;

b. allowance of an administrative claim for stub rent and payment thereof is not available under section 503(b)(1) because section 365(d)(3) and, in the event of an assumption, section 365(b)(1)(A) are the *sole* bases for awarding an administrative claim to a landlord for post-petition rent; and

c. assuming, *arguendo*, that allowance of an administrative claim for stub rent and payment thereof are available under section 503(b)(1), the Court should deny the Landlord's request for same because:

(1) it would be premature for the Court allow and require immediate payment of an administrative claim for stub rent prior to the Court entering an order authorizing assumption or rejection of the applicable lease;

(ii) the Landlords have failed to meet their burden of establishing that the stub rent is an actual, necessary cost and expense of preserving the Debtors' estates, and

(iii) the Landlords have failed to establish sufficient cause to compel the Debtors to pay the asserted administrative claim at this time.

On July 24, 2008, the Court convened an evidentiary hearing on the motions for allowance and immediate payment of the stub rent. This matter is now ripe for decision.

LEGAL DISCUSSION

I. Statutory Interpretation

The Supreme Court has often reiterated that the starting point of statutory analysis is the plain meaning of the text of the statute, recently observing that "when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms."[4] Additionally, the Supreme

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[4] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)) (internal citations omitted). *See also Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms").

Court has repeatedly stated that "Congress says in a statute what it means and means in a statute what it says there."[5]

II. Section 365(d)(3) Is Inapplicable To The Landlords' Request For Allowance And Payment Of Stub Rent.

Section 365(d)(3) of the Bankruptcy Code provides, in pertinent part, that the trustee must "timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1)."[6] It is well settled in this Circuit that, in the context of section 365(d)(3), the plain meaning of "obligations" is "something that one is legally required to perform under the terms of the lease."[7] Moreover, an obligation only arises when a party becomes legally obligated to perform it.[8]

In this case, under each of the Leases, the rent is due in advance on the first of each month. Thus, the June rent was due on June 1st, 9 days before the Petition Date. Under the plain meaning of section

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[5] *Hartford Underwriters Ins. Co.*, 530 U.S. at 6 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

[6] 11 U.S.C. § 365(d)(3).

[7] *Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209 (3d Cir. 2001).

[8] *Id.*

365(d)(3), the June rent obligations arose pre-petition and are not administrative expenses under section 365(d)(3).[9]

III. The Court Can Allow An Administrative Claim On Behalf Of A Landlord For Unpaid Post-Petition Rent Under Section 503(b)(1) Of The Bankruptcy Code As An Actual, Necessary Cost And Expense Of Preserving The Estate

The heart of the dispute before the Court is whether section 365(d)(3) and 365(b)(1)(A) of the Bankruptcy Code are the *sole* bases for the allowance and payment of an administrative claim to a landlord for stub rent. Or, rather, can the Court allow an administrative claim for stub rent under section 503(b)(1) of the Bankruptcy Code as an actual, necessary cost and expense of preserving the estate. The Court finds that, based upon the plain meaning of the statute, the Court can allow an administrative claim for stub rent under section 503(b)(1).

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[9] *See In re DVI, Inc.*, 308 B.R. 703, 707 (Bankr. D. Del. 2004); *In re ZB Co., Inc.*, 302 B.R. 316, 319 (Bankr. D. Del. 2003); and *In re HQ Global Holdings, Inc.*, 282 B.R. 169, 172-73 (Bankr. D. Del. 2002). *Compare In re Fleming Companies, Inc.*, 308 B.R. 689, 691-92 (Bankr. D. Del. 2004) (In interpreting section 365(d)(10), which requires the trustee to pay lease payments "arising from or after 60 days after the order for relief under an unexpired lease of personal property ... until such lease is assumed or rejected," the Court applied by analogy the Third Circuit's holding in *In re Montgomery Ward* regarding section 365(d)(3).)

a. The intersection of sections 365(d)(3), 365(b)(1)(A), and 365(g)(1) with section 503(b)(1).

Section 365(d)(3) requires the trustee to "timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, *notwithstanding section 503(b)(1).*"[10] The Debtors argue that section 365(d)(3) specifically renders section 503(b)(1) inapplicable to post-petition obligations under any unexpired lease of nonresidential real property and, thus, the Court cannot allow an administrative claim on behalf of a landlord for stub rent under section 503(b)(1).

Section 365(b)(1)(A) provides, in pertinent part, that "[i]f there has been a default in an . . . unexpired lease of the debtor, the trustee may not assume such . . . lease unless, at the time of assumption of such . . . lease, the trustee . . . cures, or provides adequate assurance that the trustee will promptly cure, such default . . ."[11] In addition, section 365(g)(1) provides that "the rejection of an . . . unexpired lease of the debtor constitutes a breach of such . . . lease . . . if such . . . lease has not been assumed under this section or under a plan confirmed under [chapter 11], immediately before the date of the filing of the petition."[12]

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[10] 11 U.S.C. §365(d)(3) (emphasis added).

[11] 11 U.S.C. §365(b)(1)(A).

[12] 11 U.S.C. §365(g)(1).

Section 503(b), in turn, provides that "[a]fter notice and a hearing, there shall be allowed administrative expenses."[13] Those expenses include "the actual, necessary expenses of preserving the estate."[14]

In addition to the Debtors' argument that section 365(d)(3) preempts section 503(b)(1), they argue that whether the Landlords' claim for stub rent may be allowed and paid as an administrative claim depends entirely on whether the Debtors assume or reject the applicable lease. If the Debtors assume one or more of the Leases, then the Debtors would be obligated to pay the stub rent to cure a default for nonpayment under the applicable lease.[15] But, if the Debtors reject one or more of the Leases the stub rent may not be entitled to status as an administrative claim as the claim arose pre-petition and rejection makes such claims unsecured.[16] Thus, section 503(b)(1) must be inapplicable because it conflicts with sections 365(b)(1)(A) and 365(g)(1).

The Landlords counter both these arguments by arguing that sections 365(d)(3) and 503(b)(1) are mutually exclusive and, thus, the Court can allow an administrative claim for stub rent and authorize payment on that claim under section 503(b)(1) as an actual, necessary cost and expense of preserving the estate. The Landlords further rely on a number of

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[13] 11 U.S.C. §503(b).

[14] 11 U.S.C. §503(b)(1)(A).

[15] 11 U.S.C. §365(b)(1)(A).

[16] 11 U.S.C. §365(g)(1).

cases from this jurisdiction that they assert support their argument.[17]

b. Section 365(d)(3)

The Court rejects the Debtors' argument that section 365(d)(3) renders section 503(b)(1) inapplicable to post-petition obligations under any unexpired lease

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[17] *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d 624, 627 (3d Cir. 1990) ("When the creditor involved is a landlord seeking rent for the use and occupancy of real estate . . . the landlord may seek payment as a first priority creditor. There is no question, of course, that the payment of rent for the use and occupancy of real estate ordinarily counts as an 'actual, necessary' cost to which a landlord, as a creditor, is entitled."); *In re Garden Ridge Corp.*, 321 B.R. 669, 674 (Bankr. D. Del. 2005) (Noting that Court previously ordered in a bench ruling "that the Debtors shall pay the contract rent in full because regardless of section [362(d)(3)], some, if not all, of the February 2004 rent will be due under section 503(b)."); *In re DVI, Inc.*, 308 B.R. at 707-08 ("A landlord is entitled to an administrative claim in the amount of the fair market value of the premises when a debtor occupies and uses them post-petition.") (internal citations omitted); *In re Chi-Chi's, Inc.*, 305 B.R. 396, 401 (Bankr. D. Del. 2004) (Agreeing with holding in *In re ZB Co., Inc.*, 302 B.R 316 (Bankr. D. Del. 2003) that where debtors are receiving payment from liquidator for stub rent there is no justification for the debtors not paying the rent owed to the landlords but declining to apply holding because facts are distinguishable); *In re ZB Co., Inc.*, 302 B.R at 319 ("That proration of rent is not permitted under section 365(d)(3) does not leave the Landlords without a remedy, however. Section 503(b)(1)(A) grants an allowed administrative claim for 'the actual, necessary costs and expenses of preserving the estate....' Section 503(b)(1)(A) fills the stub period gap created by section 365(d)(3)."); and *In re HQ Global Holdings, Inc.*, 282 B.R. at 173 ("A lessor is generally entitled to an administrative claim under section 503(b) for the fair rental value of the lessor's property actually used by the debtor.") (citations omitted).

of nonresidential real property. The proviso "notwithstanding section 503(b)(1)" at the end of section 365(d)(3) means that the trustee must "timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed as rejected," *in spite of the terms of section 503(b)(1)*.[18] Put another way, section 365(d)(3) "effectively reads: *'forget what §503(b) says'* when the issue is pre-rejection period obligations of a nonresidential real estate lease. . ." and "*aside from administrative expenses provided for in §503(b)(1)*, §365(d)(3) creates a new and different obligation – one that does not necessarily rest on the administrative expense concept."[19] In short, section 365(d)(3) does not limit a landlord's remedies for payment of post-petition rent to that section, rather it expands those rights by providing for the timely payment of rent obligations without the need for a landlord to file an administrative claim and seek immediate payment.[20]

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[18] II SHORTER OXFORD ENGLISH DICTIONARY, p. 1952 (6th ed. 2007) (notwithstanding means "[i]n spite of, without regard to or prevention by.").

[19] *In re Valley Media, Inc.*, 290 B.R. 73, 77 (Bankr. D. Del. 2003).

[20] *Id.* ("Thus, I do not have to conclude that the obligation [under section 365(d)(3)] is an administrative expense claim. I simply conclude that Congress found it appropriate to require that the lease 'obligations' must be timely paid (i.e., when due in the pre-rejection period), however one may otherwise label those 'obligations.' Additionally, I note that in the second sentence of § 365(d)(3) (relating to the 60 day grace period for cause) the statute speaks in terms of 'performance' of any such obligation, not payment of an administrative expense claim. Absent the grace period relief, the clear intent of the statute is that lessors get paid

Although the majority of the cases cited by the Landlords are either not on point or readily distinguishable, the decision in *In re ZB Co., Inc.* supports the Court's holding that section 365(d)(3) does not render section 503(b)(1) inapplicable to post-petition obligations under any unexpired lease of nonresidential real property.[21] In that case, the debtors sought the use of cash collateral to collect the stub rent due under the debtors' leases from an agent conducting going out of business sales but not to pay the landlords. Rather, the debtors sought to use those funds to satisfy other obligations. The Court found that (i) section 365(d)(3) did not allow for prorating and paying rent on a per diem basis for the stub rent; (ii) "section 503(b)(1)(A) fills the stub period gap created by section 365(d)(3)" and, thus, administrative claims for stub rent are allowed; (iii) absent evidence to the contrary, the amount due under section 503(b)(1)(A) for stub rent is presumed to be the contract rate; and (iv) where the debtors are receiving payment from the liquidator for stub rent there is no justification for the debtors not to pay the stub rent owed to the landlords and, thus, the Court would require immediate payment.[22]

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when the obligations accrue. Finally, I note that § 503(a) provides that '[a]n entity may timely file a request for payment of an administrative expense.' There is no suggestion of any such filing requirement in § 365(d)(3). Indeed, just the opposite is suggested. The timely payment of the obligation is dictated by the statute.") (internal footnote omitted).

[21] *In re ZB Co., Inc.*, 302 B.R at 319.

[22] The Court in *In re Chi-Chi's, Inc.* specifically endorses the holding in *In re ZB Co., Inc.* that where the debtors are receiving payment from a liquidator for stub rent there is no justification for

In addition, Judge Walsh's decision in *In re Valley Media, Inc.* supports the Court's holding.[23] In that case, the landlord moved for immediate payment of real estate taxes that applied to both a pre-petition and post-petition period but where payment of those taxes was due post-petition under the lease. The Court held that where the lease obligated the debtor-tenant to pay the tax bill upon receipt, which occurred post-petition, the entirety of the tax payment must be made in a timely manner under section 365(d)(3). In so holding the Court noted that "§ 365(d)(3) can be read to say that *aside from administrative expenses provided for in §503(b)(1)*, §365(d)(3) creates a new and different kind of 'obligation' - one that does not necessarily rest on the administrative expense concept."[24] Thus, the Court, at least implicitly, states that section 365(d)(3) and 503(b)(1) are mutually exclusive and neither section trumps or replaces the other.

In sum, by asserting that section 365(d)(3) specifically renders section 503(b)(1) unavailable, the Debtors are effectively arguing that section 365(d)(3) should be read to mean that the trustee must timely perform all the obligations of the debtor arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease

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the debtors not paying the rent owed to the landlords but only implicitly endorses the holding that "[s]ection 503(b)(1)(A) fills the stub period gap created by section 365(d)(3)." *See In re Chi-Chi's, Inc.*, 305 B.R. at 401.

[23] *In re Valley Media, Inc.*, 290 B.R. at 77.

[24] *Id.* (emphasis added).

is assumed or rejected, *in lieu of or in place of section 503(b)(1)*. Of course, that is not what the statute says and, not surprisingly, that interpretation is not supported by the case law. The Court will not rewrite the statute as requested by the Debtors but, rather, will apply its plain meaning.

c. Sections 365(b)(1)(A) and 365(g)(1)

The effect of the Debtors' ultimate assumption or rejection of the Leases on the priority of the Landlords' claims does not alter the Court's determination that it can allow an administrative claim for stub rent under section 503(b)(1). The Debtors argument relies on the supposition that, in the event the Debtors reject one or more of the Leases, under section 365(g)(1), all of the Landlords' claims under the rejected leases will be unsecured, including the claims for unpaid stub rent. As a result, the Debtors argue that section 503(b)(1)(A) conflicts with section 365(g)(1) and is unavailable to the Landlords. The Debtors further argue that their interpretation of the statutory scheme is bolstered by the fact that, in the event the Debtors assume one or more of the Leases, the Debtors' default for failure to pay the stub rent stub rent would have to be cured under section 365(b)(1)(A). Thus, the Debtors argue that section 365(b)(1)(A) makes section 503(b)(1) redundant and unnecessary.

The Court rejects the Debtors' supposition that, in the event of rejection, a landlord's claim for stub rent would necessarily be unsecured. Rather, Courts routinely allow administrative claims for post-petition occupancy and use of real property by a debtor as an actual, necessary cost of preserving the estate even if the debtor has already rejected the applicable lease or

the lease expired pre-petition.[25] The fact that, under section 365(g)(1), the rejection of a lease constitutes a breach of the lease immediately before the date of the filing of the petition is of no moment as to whether a debtor may be liable for an administrative claim for post-petition use and occupancy of the premises.

For example, in *In re DVI, Inc.*, the debtors filed bankruptcy in mid-August. The Court subsequently approved rejection of the applicable lease, effective September 30th. Although the debtors ceased operations at the premises on that date, they left behind their personal property. Additionally, for two months the debtors maintained the keys and access to the premises and periodically entered the premises to show prospective purchasers the personal property. That property was eventually sold to a buyer and all of the debtor's property was removed by November 30th. The landlord sought allowance of an administrative

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[25] *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d at 627 (allowing administrative claim for post-petition use and occupancy of premises by debtor under expired lease); *In re Garden Ridge Corp.*, 321 B.R. at 676-77 (allowing administrative claim for stub rent and requiring immediate payment prior to debtors' assumption or rejection of lease); *In re DVI, Inc.*, 308 B.R. at 707-08 (allowing administrative claim for stub rent under rejected lease and post-rejection occupancy of premises); and *In re ZB Co., Inc.*, 302 B.R. at 319-320 (allowing administrative claim for stub rent and requiring immediate payment prior to debtors' assumption or rejection of lease). *But see In re Chi-Chi's, Inc.*, 305 B.R. 401-02 (allowing claim for stub rent in rejected lease where debtors had received payment of stub rent from sub-lessees but deferring liquidation and payment of claim until confirmation of plan); and *In re HQ Global Holdings, Inc.*, 282 B.R. at 173-75 (allowing claim for stub rent but deferring liquidation and payment of claim until debtors assume or reject leases);

claim for stub rent and the use and occupancy of the premises for the post-rejection period. The Court allowed the claim under section 503(b)(1).

In addition, in *Zagata Fabricators, Inc. v. Superior Air Prods.*, the Third Circuit held that a landlord may have an allowed administrative claim under a lease for post-petition use and occupancy of the landlord's premises. In that case, the Court reversed the denial of allowance of an administrative claim for post-petition use and occupancy of the premises by a debtor *under an expired lease*, noting that there is no authority to support "the extraordinary remedy granted here, namely, possession free of charge."[26] In this case, the issue is not whether the Landlords will receive a claim for the stub rent but, rather, the nature and priority of that claim, i.e., administrative or unsecured. The Third Circuit further noted, however, that "[t]here is no question, of course, that the payment of rent for the use and occupancy of real estate ordinarily counts as an 'actual, necessary' cost to which a landlord, as a creditor, is entitled."[27]

The Debtors in this case attempt to distinguish the result in *In re DVI, Inc.* on the basis that, in that case, the allowance of the administrative claim was not at issue, rather the parties disputed the amount of the asserted claim and the timing of payment. Nonetheless, this Court finds that the Court in *In re DVI, Inc.* reached the correct result under the statute and *Zagata Fabricators, Inc. v. Superior Air Prods.*

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[26] *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d at 628.

[27] *Id.* at 627.

Surely, a landlord whose premises are used and occupied by a debtor post-petition under an unexpired lease cannot be in a worse position than a landlord whose lease expired pre-petition merely because the unexpired lease is ultimately rejected.[28] To allow otherwise would grant debtors a windfall neither contemplated nor justified by the Bankruptcy Code.

d. Burden of proof under section 503(b)(1)

It is the claimant's burden to establish that its asserted administrative claim is an actual, necessary expense of preserving the debtor's estate.[29] Moreover, the amount of the administrative claim for that use and occupancy is the fair market value, which is presumably the lease rate unless there is evidence to the contrary.[30]

In this case, the Debtors contest whether the Landlords have satisfied their burden of establishing that the stub rent is an actual, necessary expense of preserving the Debtors' estates.[31] Under *Zagata Fabricators, Inc. v. Superior Air Prods.*, however, the mere fact that the Debtors are occupying the

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[28] An *expired* lease of real property cannot be assumed or rejected. *In re Consol. Med. Transp., Inc.*, 300 B.R. 435, 450 (Bankr. N.D. Ill. 2003) ("Section § 365 excludes expired leases from the assumption powers.").

[29] *In re DVI, Inc.*, 308 B.R. at 708.

[30] *Id.*

[31] The Debtors do not dispute the amount of stub rent due under the Leases.

Landlords' premises is sufficient, in and of itself, to establish that payment for that use and occupancy is an actual, necessary expense of preserving the Debtors' estates under section 503(b)(1).[32] Moreover, the amount of the administrative claim for that use and occupancy is the fair market value, which is presumably the lease rate unless there is evidence to the contrary.[33] The Debtors submitted no such evidence in this case. Thus, under section 503(b)(1), the Court will allow the Landlords' administrative claims in the agreed amount.[34]

IV. The Court Will Not Require Immediate Payment Of The Landlords' Allowed Administrative Claims

In addition to seeking allowance of administrative claims for stub rent, the Landlords request that the Court require the Debtors to pay the claims within 20 days of allowance. The timing of payment of an administrative claim for stub rent was addressed by Judge Walrath in *In re HQ Global Holdings, Inc.*

> Section 503 provides that an entity can request payment of an administrative expense

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[32] *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d at 627. *See also In re Garden Ridge Corp.*, 321 B.R. at 676; *In re DVI, Inc.*, 308 B.R. at 708; *In re ZB Co., Inc.*, 302 B.R. at 319; and *In re HQ Global Holdings, Inc.*, 282 B.R. at 173.

[33] *In re Garden Ridge Corp.*, 321 B.R. at 676-77; *In re DVI, Inc.*, 308 B.R. at 708; and *In re ZB Co., Inc.*, 302 B.R. at 319.

[34] As noted earlier, the Debtors do not dispute the amount of stub rent due under the Leases.

> which may be allowed after notice and a hearing. Section 503, however, does not address the question of when a claim for administrative expense is to be paid.
>
> The determination of the timing of payment of administrative expenses is a matter within the discretion of the bankruptcy court. In making this determination, one of the chief factors courts consider is bankruptcy's goal of an orderly and equal distribution among creditors and the need to prevent a race to the debtor's assets. Thus, distributions prior to confirmation of a plan are usually disallowed when the estate may not be able to pay all administrative expenses in full. Other factors include the particular needs of each administrative claimant and the length and expense of the case's administration.[35]

In support of their request, the Landlords argue that the Debtors should not be permitted to pick and choose when certain administrative claims are paid. For instance, the Debtors should not be allowed to pay its vendors for post-petition receipt of goods or its professionals for their allowed fees and expenses while not paying the Landlords for stub rent. To let the Debtors do so would treat claims of the same priority differently in derogation of a key principle of the Bankruptcy Code and unfairly place the risk of administrative insolvency solely on unpaid administrative claimants.

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[35] *In re HQ Global Holdings, Inc.*, 282 B.R. at 173 (internal citations omitted).

The Debtors oppose the Landlords' request for immediate payment. They argue that payment should await confirmation of the Debtors' plan of reorganization at which time payment of allowed administrative claims will be required by sections 507(a)(2), 1123(a)(1), 1129(a)(1) and 1129(a)(9) of the Bankruptcy Code. Ironically, the Debtors also argue, as did the Landlords, that requiring payment would be inequitable to other administrative claimants. Although in the Debtors' case, they seek to treat the Landlords equally with other unpaid holders of administrative claims. Finally, the Debtors argue that requiring the Debtors to pay administrative claims for stub rent would open the floodgates of litigation by encouraging other landlords to request immediate payment of stub rent.

The Landlords' argument that delaying the payment for stub rent while immediately paying other administrative claims inequitably treats their unpaid claims from the paid claims is fundamentally flawed. An equal distribution among creditors does not require a simultaneous distribution. While the Landlords are losing the time value of their unpaid stub rent as it sits in the hands of the Debtors not accruing interest – that is simply a normal and unremarkable result of the fact that bankruptcy proceedings take time.[36] Indeed, the payment of interest on claims in bankruptcy is generally not available other than, for example, the payment of post-petition interest to over

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[36] THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW, pp. 151-92 (Harvard Univ. Press 1986).

secured creditors.[37] The cases cited by the Landlords in support of their argument are readily distinguishable as they address a very different scenario in which administrative creditors are receiving different distributions on the principal amount of their claims, e.g., one creditor is receiving 100% payment on its claim while another is receiving 75%.[38] This usually occurs in cases that become

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[37] *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988) ("Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims-just as it denies over secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral. Section 506(b) provides that ' [t]o the extent that an allowed secured claim is secured by property the value of which ... is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim.' (Emphasis added.) Since this provision permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest. See 11 U.S.C. § 502(b)(2). If the Code had meant to give the undersecured creditor, who is thus denied interest on his claim, interest on the value of his collateral, surely this is where that disposition would have been set forth, and not obscured within the 'adequate protection' provision of § 362(d)(1). Instead of the intricate phraseology set forth above, § 506(b) would simply have said that the secured creditor is entitled to interest 'on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser.' Petitioner's interpretation of § 362(d)(1) must be regarded as contradicting the carefully drawn disposition of § 506(b).").

[38] *In re Specker Motor Sales Co. v. Eisen*, 393 F.3d 659, 664 (6th Cir. 2004) (In administratively insolvent estate, counsel that received interim compensation for 100% of allowed claim required to disgorge that amount of claim necessary to ensure equal pro

administratively insolvent post-petition but not all administrative claims are paid. Thus, courts will not compel payment of administrative claims where there is a substantial risk of insolvency. [39]

The Landlords have failed to meet the generally accepted standard articulated in *In re HQ Global Holdings, Inc.* As discussed above, the delay in payment is not in and of itself inequitable. The Landlords further argue that they are being required to bear the risk of administrative insolvency -- but

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rata distribution among all allowed administrative claims.); *Delgado Oil Co. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986) (Statute appointing debtor in possession as trust enables *(but does not require)* the trustee to achieve an equality of distribution among the corporation's *unsecured* creditors); *In re Holley Garden Apts., Ltd.*, 238 B.R. 488, 495 (Bankr. M.D. Fla. 1999) (Chapter 11 plan is confirmable when it meets the criteria of section 1129, which includes equal distribution among similarly situated creditors.); *In re Telesphere Commc'ns. Inc.*, 148 B.R. 525, 529 (Bankr. N.D. Ill. 1992) (Requiring payment of post-petition obligations and, thus inequality of distribution, under section 365(d)(3) – *not 503(b)(1)* – despite administratively insolvency); *In the Matter of Holly's, Inc.*, 140 B.R. 643 (Bankr. W.D. Mich. 1992) (Pre-petition subordination agreement in dual bankruptcy case unenforceable where both parties in bankruptcy.); *In re Vernon Sand & Gravel, Inc.*, 109 B.R. 255, 257 (Bankr. N.D. Ohio 1989) (If administrative claims are paid on an interim basis and the estate is thereafter found to be administratively insolvent, disgorgement of the interim payments is appropriate to ensure a pro rata distribution to administrative claimants); and *In re Western Farmers Ass'n*, 13 B.R. 132, 134 (Bankr. W.D. Wash. 1981) (To ensure equality of treatment to all allowed administrative claims, interim payments of compensation to debtor's professionals not to be made because there is a significant possibility of administrative insolvency).

[39] *In re HQ Global Holdings, Inc.*, 282 B.R. at 173.

there is virtually no such risk in this case. In addition, the Debtors have already filed a plan of reorganization and confirmation is scheduled for October 6, 2008. Under the proposed plan, allowed administrative claims will be paid in full "as soon as reasonably practicable" after the initial distribution made under the plan.[40] Thus, any delay in payment will be minimal and any risk of administrative insolvency is further reduced by the likely short administration of the Debtors' cases. Finally, the Landlords did not provide any evidence that the delay in payment would prejudice or harm the Landlords.

In addition, a debtor's decision as to the timing of the payment of claims is generally inside the ordinary course of the debtor's business.[41] Certainly a decision relating to the payment of rent by these Debtors, which lease and operate approximately 300 stores, is inside the Debtors' ordinary course of business. As such, the Debtors' decision is entitled to deference, i.e., "the Court will not entertain an objection to [a transaction made in the ordinary course of business], provided that the conduct involves a business judgment made in good faith upon a reasonable basis and within the scope of authority under the

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[40] First Amended Joint Plan Of Reorganization Proposed By Goody's Family Clothing, Inc. And Its Subsidiary Debtors And The Official Committee Of Unsecured Creditors, §3.1 [Docket No. 568].

[41] *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 797 (Bankr. D. Del. 2007) (Setting forth the horizontal and vertical dimension test for determining whether a transaction is in the ordinary course of business).

Bankruptcy Code."[42] Although courts generally do not apply the business judgment standard under 363(b) to the payment (or non-payment) of post-petition rent, it seems the more logical and appropriate standard. As the Court has determined in this case that a delay in payment is not in and of itself inequitable, the Debtors' decision not to pay the stub rent is "within the scope of authority under the Bankruptcy Code."[43] Moreover, there is no evidence that the Debtors' decision is anything other than "a business judgment made in good faith upon a reasonable basis."[44]

Finally, courts have consistently declined to require immediate payment of stub rent in similar circumstances. For example, in *In re HQ Global Holdings, Inc.* the Court deferred its decision on the amount and payment of stub rent pending the debtors' decision regarding assumption or rejection of the leases.[45] The Court based its decision on the fact that assumption would moot the issue, the debtors' stated intention to reorganize under its current business model, which would require the assumption of all or most of the leases, and the cost savings associated with deferring the decision. The facts in this case are even more compelling as the Debtors have actually filed a plan of reorganization under which they seek to reorganize under their current business model.

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[42] *Id.* at 799 (citation omitted).

[43] *Id.*

[44] *Id.*

[45] *In re HQ Global Holdings, Inc.*, 282 B.R. at 175.

The Court in *In re Chi's-Chi's, Inc.* also declined to require immediate payment.[46] In so doing the Court relied on the fact that the debtors would soon "monetize its assets and proceed to claim resolution and eventual payment under a plan."[47] The Court also noted that there was no risk of administrative insolvency. These are the very facts before the Court in this case.

The Court in *In re ZB Co., Inc.* did require immediate payment of stub rent.[48] That case, however, is readily distinguishable on this point. As discussed earlier, in that case, the debtors sought the use of cash collateral to collect the stub rent due under the debtors' leases from the agent conducting going out of business sales. The Debtors did not seek to use those funds to pay the landlords the stub rent, but, rather, sought to use the money to satisfy other obligations. As a result, the Court found that since the debtors were receiving payment from the liquidator for stub rent there was no justification for the debtors not to pay the stub rent owed to the landlords and the Court required immediate payment of the stub rent. There is no such arrangement in this case. The Debtors continue to occupy the Landlords' premises and conduct business at the locations. The Debtors are not withholding payment of stub rent that they have already received from a liquidator or subtenant.

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[46] *In re Chi's-Chi's, Inc.*, 305 B.R. at 401-02.

[47] *Id.* at 401.

[48] *In re ZB Co., Inc.*, 302 B.R. at 320.

Based on minimal risk of administrative insolvency in this case, the terms of the pending plan of reorganization that is scheduled for confirmation in approximately one month and the lack of any evidence of potential harm to the Landlords arising from the ongoing delay in payment of the stub rent, the Court will not require the Debtors to pay the allowed administrative claims of the Landlords at this time. Alternatively, as the delay in payment is within the scope of authority under the Bankruptcy Code and there is no evidence that the Debtors' decision is anything other than a business judgment made in good faith upon a reasonable basis, the Court will not entertain the Debtors' objection to the timing of the payment of stub rent. Thus, regardless of whether the standard articulated in *In re HQ Global Holdings, Inc.* or the business judgment standard under section 363(b) is applicable, the Court will deny the Landlords' request for immediate payment of stub rent.

CONCLUSION

For the reasons set forth above, the Court will allow the Landlords' administrative expense claims in the agreed amount under section 503(b)(1) of the Bankruptcy Code. The Court will deny, however, the Landlords' request for immediate payment of the allowed administrative claims. An order will be issued.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11

Case No. 08-11133(CSS)
Jointly Administered

Re Docket Nos. 207, 248 and 262

[Filed August 26, 2008]

In re:	)
	)
GOODY'S FAMILY CLOTHING, INC., et al.,	)
Debtors.	)

ORDER

For the reasons set forth in this Court's Opinion[1] dated August 26, 2008, which is incorporated by reference as if set forth in full herein:

IT IS HEREBY ORDERED that:

1. The Court grants in part and denies in part the motions for allowance and immediate payment of administrative expense claims filed by: (I) Libby Westmark Enterprises, LLC and Libby Cross Station

[1] The Opinion constitutes the Court's findings of fact and conclusions of law, pursuant to Federal Rule of Bankruptcy Procedure 7052.

Enterprises, LLC (collectively, "Libby"); (ii) Bernard Court, LLC, Cookeville Retail Holdings, LLC, and Owensboro Towne Center, LLC (collectively, "Owensboro"); and (iii) Mountaineer Property Co. ("Mountaineer," collectively with Libby and Owensboro, the "Landlords").

2. Pursuant to 11 U.S.C. §503(b)(1), the Landlords have allowed administrative claims in the following amounts:

(I) Libby - $22,491;

(ii) Owensboro - $49,315; and

(iii) Mountaineer - $18,700 (collectively the "Allowed Administrative Claims").

3. The Landlords' request for immediate payment of the Allowed Administrative Claims is denied.

/s/ Christopher S. Sontchi
Christopher S. Sontchi
United States Bankruptcy Judge

Dated: August 26, 2008

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11

Case No: 08-11133(CSS)
Jointly Administered

Related to Docket Nos. 297, 507, 510, 529, and 670

[Filed October 6, 2008]

In re:	)
	)
GOODY'S FAMILY CLOTHING, INC., et al.,	)
	)
Debtors.	)

ORDER GRANTING MOTION OF EASTGATE MALL, LLC PURSUANT TO SECTION 503(b) OF THE BANKRUPTCY CODE, TO COMPEL ALLOWANCE AND PAYMENT OF POST-PETITION RENTAL OBLIGATIONS AS ADMINISTRATIVE EXPENSES

For the reasons set forth in this Court's Opinion dated August 26, 2008 and on the record during a

Hearing in this case on September 22, 2008, which are incorporated by reference as if fully set forth herein:

IT IS HEREBY ORDERED that:

1. The Court grants in part the Motion of Eastgate Mall, LLC ("Landlord") to compel allowance and payment of its administrative claim (the "Motion").

2. Pursuant to 11 U.S.C. § 503(b)(1), the Landlord has an allowed administrative claim in the amount of $22,305.56.

3. The Landlord has withdrawn its request for immediate payment of its administrative claim and, therefore, the Court makes no ruling with respect to that part of the Motion.

/s/ Christopher S. Sontchi
Christopher S. Sontchi
United States Bankruptcy Judge

Dated: October 3, 2008

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APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11

Case No: 08-11133(CSS)
Jointly Administered

Related to Docket No. 605, 633

[Filed October 6, 2008]

In re:	)
	)
GOODY'S FAMILY CLOTHING, INC., et al.,	)
	)
Debtors	)
	)

ORDER GRANTING MOTION OF VALDOSTA MALL CORNERS, G.P. AND STAFFORD BLUFFTON, LLC PURSUANT TO SECTION 503(b) OF THE BANKRUPTCY CODE, TO ALLOW POST-PETITION RENTAL OBLIGATIONS AS ADMINISTRATIVE EXPENSES

For the reasons set forth in this Court's Opinion dated August 26, 2008 and on the record during a

Hearing in this case on September 22, 2008, which are incorporated by reference as if fully set forth herein:

IT IS HEREBY ORDERED that:

1. The Court grants the Motion of Valdosta Mall Corners, G.P. and Stafford Bluffton, LLC to allow their administrative claims (the "Motion").

2. Pursuant to 11 U.S.C. §503(b)(1), Valdosta Mall Corners, G.P. has an allowed administrative claim in the amount of $10,741.50.

3. Pursuant to 11 U.S.C. §503(b)(1), Stafford Bluffton, LLC has an allowed administrative claim in the amount of $19,855.

4. To the extent Valdosta Mall Corners, G.P. and Stafford Bluffton, LLC seek immediate payment of the administrative claim this is denied.

/s/ Christopher S. Sontchi
Christopher S. Sontchi
United States Bankruptcy Judge

Dated: ~~September~~ 10/3, 2008

SL1 867796v1/103829.00001

APPENDIX F

11 U.S.C. § 365. Executory Contracts And Unexpired Leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such

contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d) (1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected,

notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) (A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B) (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of

this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e) (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) (1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under

such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h) (1) (A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable

nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2) (A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such

timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i) (1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to [to] enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of

such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not

extend any commitment that would otherwise be terminated by any act of such an agency.

(p) (1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2) (A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

11 U.S.C. § 503. Allowance Of Administrative Expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1) (A) the actual, necessary costs and expenses of preserving the estate including—

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax—

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except

a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the

later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid—

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—

(A) the transfer or obligation is essential to retention of the person because the individual

has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either—

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

No. 10-437

In the Supreme Court of the United States

GOODY'S FAMILY CLOTHING, INC., et al.,
Petitioners,

v.

MOUNTAINEER PROPERTY CO. II, LLC, EASTGATE MALL, LLC, and STAFFORD BLUFFTON, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPREME COURT RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6 the Respondents make the following disclosures:

1. The Respondents are non-governmental corporate parties.

2. The parent corporations for the Respondents are as follows:

   a. Mountaineer Property Co. II, LLC – Mountaineer Management Co.

   b. Stafford Bluffton, LLC – Stafford Development Company.

   c. Eastgate Mall, LLC – (i) JM Chattanooga, LLC; (ii) Eastgate Town Center, LLC; (iii) Crown Eastgate (Delaware), LLC; and (iv) Select Eastgate, LLC.

3. No public company holds 10% or more of any stock of the Respondents.

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STATEMENT OF THE CASE

Eastgate Mall, LLC ("Eastgate"), Mountaineer Property Co. II, LLC ("Mountaineer") and Stafford Bluffton, LLC ("Stafford") (hereinafter, Eastgate, Mountaineer and Stafford shall be collectively referred to as the "Landlords") entered into leases with Goody's Family Clothing, Inc. or its direct or indirect subsidiaries (collectively "Goody's" or the "Petitioners") pursuant to which Goody's leased from the Landlords non-residential real property located in Tennessee, South Carolina and West Virginia on which Goody's operated retail clothing stores. Pursuant to the leases, the Landlords were to be paid rent in advance on the first day of each month during the term of the leases.

On June 9, 2008 (the "Petition Date"), Goody's filed voluntary petitions for relief under Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). On the Petition Date, Goody's also requested authority from the Bankruptcy Court to retain a liquidating agent to assist Goody's in conducting store-closing sales at certain of its retail locations. The stores located on the properties that Goody's leased from the Landlords were included among the stores at which Goody's sought authority to conduct store-closing sales. The Bankruptcy Court granted the motion and a store closing agent was hired to conduct going out of business sales. Specifically, the Bankruptcy Court authorized Goody's and the store-closing agent to begin selling merchandise on the Landlords' properties.

Goody's continued to occupy and conducted going out of business sales on the Landlords' properties. It is undisputed that the store closing sales were successful. Pursuant to the authority afforded by the Bankruptcy Court and pursuant to an agency agreement by and between Goody's and the store closing agent, Goody's received from the agent per diem rent associated with the use of the Landlords' properties following the Petition Date. In other words, in addition to utilizing the Landlords' properties to liquidate assets, Goody's collected per diem rent from the store closing agent for the postpetition period during which the going out of business sales were being conducted. After concluding the going out of business sales Goody's vacated the Landlords' properties and rejected the leases.

Presumably anticipating the filing of bankruptcy, Goody's failed to pay the Landlords the rent that was due under the leases on June 1, 2008. Although receiving per diem rent from the store closing agent, Goody's also refused to pay the postpetition per diem rent for June 2008 as specifically authorized by the order of the Bankruptcy Court. Accordingly, the Landlords filed motions for allowance of rent in the aggregate amount of $60,860.56 (the "Stub Rent") from June 9 through June 30, 2008 (the "Stub Rent Period") as an administrative expense pursuant to Section 503(b)(1) of the Bankruptcy Code. The Landlords expressly asserted that Goody's continued use of the Landlords' properties following the Petition Date, including occupying the properties to conduct successful store closing sales, entitled the Landlords to receive the Stub Rent as an administrative expense pursuant to Section 503(b)(1).

Goody's objected to the Landlords' motions. During oral arguments before the Bankruptcy Court, Goody's acknowledged that they had used and occupied the Landlords' premises during the Stub Rent Period and that they received benefit from such use and occupancy. Goody's admitted that the store closing sales conducted at the Landlords' premises were successful. Goody's also did not dispute the amount of the Stub Rent. At the conclusion of the hearings, the Bankruptcy Court entered orders allowing the Landlords' claims for Stub Rent as administrative expenses pursuant to Section 503(b)(1) of the Bankruptcy Code. (Pet. App. C53a-82a, D83a-84a and E85a-86a.)

An appeal was taken to the United States District Court for the District of Delaware (the "District Court"). The District Court issued an Opinion and Order dated March 31, 2009 affirming the Bankruptcy Court's decision. (Pet. App. B18a-52a.)

Goody's timely appealed the District Court's Order and Opinion to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). The Third Circuit issued an Opinion dated June 29, 2010, affirming the District Court's decision. (Pet. App. A1a-17a). The Third Circuit's opinion is reported at In re Goody's Family Clothing, Inc., 610 F.3d 812 (3d Cir. 2010).

Pursuant to Supreme Court Rule 10, Goody's filed its Petition for Writ of Certiorari (the "Petition") seeking review of the Third Circuit's Goody's opinion. For the reasons discussed below, the Court should deny the Petition.

SUMMARY OF THE ARGUMENT

The Petitioners erroneously maintain that both the Sixth Circuit Court of Appeals (the "Sixth Circuit") and the Eighth Circuit Court of Appeals (the "Eighth Circuit") have held that Section 365 of the Bankruptcy Code provides the exclusive basis for allowance of a landlord's claim for postpetition rent. To the contrary, none of the cases cited by Goody's in the Petition hold that Section 365(d)(3) supplants Section 503(b)(1). Indeed, no reported decision relied on by the Petitioners involves an administrative claim for stub rent under Section 503(b)(1) of the Bankruptcy Code. No decision cited by Goody's considers the intersection of Section 365(d)(3) and Section 503(b)(1) of the Bankruptcy Code. Reported decisions from both the Sixth and Eighth Circuits as well as lower court decisions are consistent with the Third Circuit's Goody's opinion. There is simply no conflict among the Circuit Courts warranting a review of the Third Circuit's Goody's opinion.

LAW AND ARGUMENT

I. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS.

Goody's relies on an unreported slip opinion from the Sixth Circuit, BK Novi Project, LLC v. Stevenson (In re Baby N' Kids Bedrooms, Inc.), Case No. 07-1606, 2008 U.S. App. Lexis 27720 (6th Cir. Mar. 26, 2008), as being in direct conflict with the Third Circuit's Goody's opinion. In BK Novi the Sixth Circuit affirmed an unreported decision from the United States District

Court for the Eastern District of Michigan denying a landlord's motion seeking an administrative expense claim for postpetition rent.

This Court should not consider an unreported decision from the Sixth Circuit as creating a conflict between the Circuit Courts warranting a review of the Goody's Opinion. Contrary to Goody's position, the Sixth Circuit in BK Novi did not hold that Section 365(d)(3) preempts Section 503(b)(1). The landlord in that case did not assert a right to payment under Section 365(d)(3). The Sixth Circuit merely held that, based on the facts presented, the landlord's claim for rent was not entitled to priority as an administrative expense under Section 503(b)(1). The Sixth Circuit did not hold that claims falling outside the parameters of Section 365(d)(3) may not qualify as administrative expenses pursuant to Section 503(b)(1). In fact, in its unreported slip opinion, the Sixth Circuit did not even consider the intersection of Sections 365(d)(3) and 503(b)(1) of the Bankruptcy Code.

Goody's also erroneously argues that the Third Circuit's Goody's opinion is contrary to the Sixth Circuit's opinion in Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.), 203 F.3d 986 (6th Cir. 2000). Koenig is factually distinguishable from the Goody's opinion. In Koenig, rent for the entire month of December 1997 became due under the terms of a lease on December 1, one day before the effective date of the Debtor's post-bankruptcy rejection of the lease on December 2, 1997. Id. at 988. Based on these facts, the Sixth Circuit held that Section 365(d)(3) of the Bankruptcy Code required payment of the full month's rent even though the debtor had vacated the premises on December 2, 1997.

Id. at 989. The Sixth Circuit relied solely on Section 365(d)(3) of the Bankruptcy Code in reaching its decision.

Koenig dealt with a lease obligation that arose postpetition and prior to the rejection of the lease, an obligation falling squarely within the parameters of Section 365(d)(3). The Goody's opinion deals with the Landlords' administrative claim for the Stub Rent, an obligation falling outside the parameters of Section 365(d)(3). The Sixth Circuit in Koenig did not hold that obligations falling outside the parameters of Section 365(d)(3) may not qualify as administrative expenses under Section 503(b)(1) as suggested by the Petitioners. In Koenig, the Sixth Circuit was not required to consider the intersection of Sections 365(d)(3) and 503(b)(1). By allowing a landlord's claim for post-bankruptcy rent under Section 365(d)(3), the Sixth Circuit's decision in Koenig is not contrary to the Third Circuit's allowance of the Landlords' administrative expense claims for the Stub Rent pursuant to Section 503(b)(1) in the Goody's opinion.

It is important that the Sixth Circuit did not overturn its decision in United Trucking Serv., Inc. v. Trailer Rental Co., Inc. (In re United Trucking Serv., Inc.), 851 F.2d 159 (6th Cir. 1988), in either BK Novi or Koenig. In United Trucking, the Sixth Circuit allowed an equipment lessor's administrative expense claim arising from a debtor's post-bankruptcy use of the lessor's property pursuant to section 503(b)(1) notwithstanding the rejection of the lease pursuant to Section 365 of the Bankruptcy Code. Id. at 162. The Third Circuit's holding and reasoning in the Goody's opinion are entirely consistent with the Sixth Circuit United Trucking decision.

Goody's also incorrectly argues that the Third Circuit's Goody's opinion is in direct conflict with the Eighth Circuit's opinion in Burival v. Roehrich (In re Burival), 613 F.3d 810 (8th Cir. 2010). In Burival, a landlord leased farmland to the debtors prior to the commencement of bankruptcy. Id. at 811. On December 1, 2007, two days after the debtors' filed Chapter 11 bankruptcy, the debtors failed to pay the rent due under the lease and ultimately rejected the lease on March 19, 2008. Id. The landlord sought payment of the full rent arising postpetition and prior to the rejection of the lease under Section 365(d)(3). Id. The Eighth Circuit granted the landlord's request. Id. at 812. In so holding, the Eighth Circuit relied upon the Sixth Circuit's decision in Koenig.

For the reasons noted above respecting Koenig, the Eighth Circuit's Burival decision is distinguishable from and does not conflict with the Third Circuit's Goody's opinion. Burival concerned a landlord's claim for rent that arose under the lease after the commencement of bankruptcy and prior to rejection of such lease, an obligation falling squarely within the parameters of Section 365(d)(3). By allowing the landlord's claim under Section 365(d)(3), the Eighth Circuit was not required to consider the intersection between Sections 365(d)(3) and 503(b)(1). Because the case did not involve a claim for stub rent, the landlord in Burival did not assert a claim under Section 503(b)(1).

In their Petition, Goody's quotes from Burival stating that "[s]ection 365(d)(3) expressly preempts subsection 503(b)(1) . . . ." 613 F.3d at 812. Goody's reliance on this partial quote is misguided. The Eighth Circuit was addressing an argument made by

the debtor that a rent claim governed by Section 365(d)(3) is not entitled to administrative expense status under Section 503(b) of the Bankruptcy Code. With the statement quoted above, the Eighth Circuit, consistent with the Goody's opinion, was merely noting that Section 365(d)(3) removed the procedural and substantive burdens placed on non-residential landlords asserting administrative claims by Section 503(b)(1) respecting obligations falling within the parameters of Section 365(d)(3). Id. The Eighth Circuit did not hold that lease obligations falling outside the parameters of Section 365(d)(3) may never qualify as administrative expenses under Section 503(b)(1).

It is important that in Burival, the Eighth Circuit discussed and did not overturn a prior decision in which the Eighth Circuit allowed administrative expense claims for rent despite the inapplicability of Section 365(d)(3). Id. at 813 (citing Reiter v. Fokkena (In re Wedemiere), 237 F.3d 938 (8th Cir. 2001)). As the Third Circuit did in the Goody's opinion, the Eighth Circuit in Wedemiere allowed landlords' administrative claims for rent equal to the reasonable rental value of the properties used by the debtors post-bankruptcy, notwithstanding the fact that such rent did not "arise" under the leases following the commencement of bankruptcy and, thus, was not payable pursuant to Section 365(d)(3). 237 F.3d at 941-42. The Third Circuit's Goody's opinion, rather than conflicting with the decisions in the Eighth Circuit, is entirely consistent with the Eighth Circuit's Wedemiere decision.

The Petitioners have failed to cite one reported Circuit Court opinion that conflicts with the Third

Circuit's Goody's opinion. All lower courts that have considered the intersection of Sections 365(d)(3) and 503(b)(1) have rejected Goody's contention that Section 365 provides the exclusive statutory basis for the allowance of a landlord's claim for rent. See e.g., In re Rhodes, Inc., 321 B.R. 80, 92 (Bankr. N.D. Ga. 2005) ("It would be a strange result indeed, bordering on the absurd, to hold that in enacting section 365(d)(3) to protect landlords, Congress intended to strip landlords of any right to payment of an administrative expense for use of their premises for the stub rent period and to leave them with only pre-petition, unsecured claims."); In re ZB Co., 302 B.R. 316, 319 (Bankr. D. Del. 2003) ("That proration of rent is not permitted under section 365(d)(3) does not leave the Landlords without a remedy, however. Section 503(b)(1)(A) grants an allowed administrative claim for 'the actual, necessary costs and expenses of preserving the estate . . .' Section 503(b)(1)(A) fills the stub gap created by section 365(d)(3)."); In re BCE West, L.P., 264 B.R. 578, 584 (9th Cir. BAP 2001), aff'd, 319 F.3d 1166 (9th Cir. 2003) (Although holding that section 365(d)(3) was inapplicable, the Bankruptcy Appellate Panel nevertheless observed "that, as a matter of law, it is true that a non-debtor party . . . to an executory contract with the debtor is entitled to an administrative claim equal to the value of any postpetition benefit conferred on the estate before assumption or rejection of that contract."); In re Hayes Lemmerz Int'l, Inc., 340 B.R. 461, 473 (Bankr. D. Del. 2006) (The bankruptcy court recognized that a lessor of equipment may be allowed an administrative claim for the benefit conferred on the bankruptcy estate pursuant to Section 503(b)(1) even though the claim is not within the parameters of Section 365(d)(5), which, similar to Section 365(d)(3), requires the debtor to

satisfy obligations first arising under personal property leases after sixth days following the commencement of bankruptcy."); In re DVI, Inc., 308 B.R. 703, 707-08 (Bankr. D. Del. 2004) ("A landlord is entitled to an administrative claim in the amount of the fair market value of the premises when a debtor occupies and uses it postpetition."); In re HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002) ("A lessor is generally entitled to an administrative claim under section 503(b) for the fair rental value of the lessor's property actually used by the debtor.")

Goody's central premise that Section 365 of the Bankruptcy Code preempts Section 503(b)(1) is inconsistent with the Supreme Court's construction of Section 365 in Nat'l Labor Relations Bd. v. Bildisco and Bildisco, 465 U.S. 513 (1984). In Bildisco the Supreme Court discussed generally the application of Section 365 of the Bankruptcy Code and claims that may be asserted by non-debtor parties to contracts and leases that are rejected in bankruptcy. While observing that claims for damages arising from the rejection of a lease or contract are to receive the priority provided general unsecured creditors, the Supreme Court nevertheless stated that "[i]f the debtor-in-possession elects to continue to receive the benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . which, depending on the circumstances of a particular case, may be what is specified in the contract." Id. at 531 (citations omitted). In the Goody's opinion, the Third Circuit, consistent with the Supreme Court's Bildisco decision, affirmed the allowance of the Landlords' administrative claim for rent equal to the reasonable

value for Goody's continued use of the Landlords' properties following the Petition Date during the Stub Rent Period.

II. THE THIRD CIRCUIT'S GOODY'S OPINION DOES NOT EXPAND A CONFLICT AMONG CIRCUIT COURTS CONCERNING THE PROPER TREATMENT OF RENT.

In their Petition, Goody's refers to a purported split among the Circuit Courts regarding determining when an "obligation", including rent, "arises" under Section 365(d)(3). According to Goody's the Third, Fourth, Sixth, Seventh and Eighth Circuit Courts of Appeals have adopted the "billing date" or "performance date" approach. (Pet. at 11-12.) Pursuant to this approach, if an obligation arises pursuant to the express terms of the lease after the commencement of bankruptcy but before the rejection or expiration of the lease, 365(d)(3) requires the debtor to satisfy such obligation. See e.g., Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 268 F.3d 205, 209 (3d Cir. 2001) ("[T]he terms of the lease . . . determine both the nature of the 'obligation' and when it 'arises.'")

Goody's maintains that the Seventh Circuit adopted the "proration" approach to determining when an "obligation" "arises" under Section 365(d)(3) in In re Handy Andy Home Improvement Ctrs., Inc., 144 F.3d 1125, 1127 (7th Cir. 1998). (Pet. at 12.) According to Goody's, under this approach a landlord is entitled to collect rent for every day following the commencement of bankruptcy that the debtor continues to occupy the leased property pursuant to Section 365(d)(3) without

resort to Section 503(b)(1). (Pet. at 13.) Contrary to Goody's contentions, the Seventh Circuit has not adopted the proration approach to determine whether a landlord's claim for postpetition rent falls within the parameters of Section 365(d)(3).

In Handy Andy the Seventh Circuit addressed a landlord's claim for real estate taxes rather than rent. 144 F.3d at 1126. Not surprisingly, the Seventh Circuit held that the portion of the real estate taxes that accrued prepetition was not an "obligation" "arising" after the petition date entitled to payment under Section 365(d)(3). Id. at 1127. In so holding, the Seventh Circuit noted that the lease at issue required that real estate taxes be prorated upon termination of the lease "so that the [debtor] would be responsible only for those taxes that had accrued before termination." Id. at 1126.

Subsequent to the Handy Andy decision, the Seventh Circuit applied the "billing date" approach respecting a landlord's claim for postpetition rent in Ha-Lo Indus., Inc. v. Centerpoint Props. Trust, 342 F.3d 794, 799 (7th Cir. 2003). In Ha-Lo the landlord leased an office building to the debtor. Id. at 796. After the debtor filed bankruptcy, the debtor rejected the lease effective November 2 and vacated the premises on November 4, 2001. Id. at 797. Because the rent for the entire month of November 2001 came due on November 1, the Seventh Circuit held that Section 365(d)(3) required the debtor to pay its November 2001 rent in full. Id. at 799. Distinguishing its earlier Handy Andy decision, the Seventh Circuit applied the "billing date" approach when determining whether the landlord's claim for rent fell within the parameters of Section 365(d)(3). Adopting the billing

date method, the Seventh Circuit discussed and relied on the Sixth Circuit's Koenig decision. Id. at 799-800. Thus, at least regarding postpetition rent claims, the Seventh Circuit's construction of Section 365(d)(3) is consistent with the decisions of other Circuit Courts, including the Third Circuit.

Even assuming the existence of a conflict among the Circuit Courts regarding the construction of Section 365(d)(3), the present case does not present an appropriate vehicle to resolve any such conflict. Upon a review of the Goody's opinion, if this Court were to reject the "billing date" approach and, instead, adopt the "proration" approach, Goody's would nevertheless be required to pay the Landlords' claims for the Stub Rent for the Stub Rent Period pursuant to Section 365(d)(3). This is because it is undisputed that the prorated rent for the Stub Rent Period is equal to the Stub Rent.

On the other hand, should this Court adopt the "billing date" approach consistent with the Third Circuit's Goody's opinion, this Court should also affirm the Goody's opinion and uphold the allowance of the Landlords' Stub Rent claim as administrative expenses pursuant to Section 503(b)(1). As noted previously, the Debtors have referred to no Circuit Court opinion holding that Section 365(d)(3) provides the exclusive means by which a landlord is entitled to postpetition rent. Instead, in jurisdictions adopting the "billing date" approach to defining the parameters of Section 365(d)(3), landlords may resort to Section 503(b)(1) to assert an administrative expense claim to the extent they can satisfy the procedural and substantive burdens imposed by such section. The Goody's opinion simply does not create or expand any purported

conflict concerning the proper treatment of claims for post-bankruptcy rent.

CONCLUSION

For the foregoing reasons, the Landlords submit that this Court should deny the Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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